No. 15-606

Title:	Miguel Angel Pena-Rodriguez, Petitioner
	v.
	Colorado
Docketed:	November 10, 2015
Linked with 15A265	
Lower Ct:	Supreme Court of Colorado
Case Nos.:	(13SC9)
Decision Date:	May 18, 2015
Rehearing Denied:	June 15, 2015

Questions Presented

---Date---	-------Proceedings and Orders----------
Aug 31 2015	Application (15A265) to extend the time to file a petition for a writ of certiorari from September 13, 2015 to November 12, 2015, submitted to Justice Sotomayor.
Sep 10 2015	Application (15A265) granted by Justice Sotomayor extending the time to file until November 12, 2015.
Nov 10 2015	Petition for a writ of certiorari filed. (Response due December 10, 2015)
Nov 12 2015	Consent to the filing of amicus curiae briefs, in support of either party or of neither party, received from counsel for the petitioner.
Nov 13 2015	Consent to the filing of amicus curiae briefs, in support of either party or of neither party, received from counsel for the respondent.
Nov 16 2015	Waiver of right of respondent Colorado to respond filed.
Dec 2 2015	DISTRIBUTED for Conference of January 8, 2016.
Dec 8 2015	Response Requested. (Due January 7, 2016)
Dec 8 2015	Brief amicus curiae of National Congress of American Indians filed.
Dec 10 2015	Brief amicus curiae of NAACP Legal Defense & Educational Fund, Inc. filed.
Dec 10 2015	Brief amici curiae of Professors of Law filed.
Dec 10 2015	Brief amicus curiae of Center on the Administration of Criminal Law filed.
Dec 21 2015	Order extending time to file response to petition to and including February 19, 2016.
Jan 7 2016	Brief amicus curiae of National Association of Criminal Defense Lawyers filed.
Jan 7 2016	Brief amici curiae of Retired Judges filed.
Feb 19 2016	Brief of respondent Colorado in opposition filed.
Mar 7 2016	Reply of petitioner Miguel Angel Pena-Rodriguez filed.
Mar 9 2016	DISTRIBUTED for Conference of March 25, 2016.
Mar 28 2016	DISTRIBUTED for Conference of April 1, 2016.
Apr 4 2016	Petition GRANTED.
Apr 22 2016	The time to file the joint appendix and petitioner's brief on the merits is extended to and including June 23, 2016.
Apr 22 2016	The time to file respondent's brief on the merits is extended to and including August 29, 2016.

May 4 2016	Consent to the filing of amicus curiae briefs, in support of either party or of neither party, received from counsel for the petitioner.
May 11 2016	Consent to the filing of amicus curiae briefs, in support of either party or of neither party, received from counsel for the respondent.
Jun 23 2016	Joint appendix filed. (Statement of costs filed.)
Jun 23 2016	Brief of petitioner Miguel Angel Pena-Rodriguez filed.
Jun 24 2016	Brief amicus curiae of The United Mexican States filed.
Jun 30 2016	Brief amicus curiae of Constitutional Accountability Center filed.
Jun 30 2016	Brief amici curiae of NAACP Legal Defense & Educational Fund, Inc., et al. filed.
Jun 30 2016	Brief amicus curiae of National Association of Federal Defenders filed.
Jun 30 2016	Brief amici curiae of Professors of Law filed.
Jun 30 2016	Brief amicus curiae of Professor Cedric Merlin Powell filed.
Jun 30 2016	Brief amici curiae of the Hispanic National Bar Association, et al. filed.
Jun 30 2016	Brief amicus curiae of Center on the Administration of Criminal Law filed.
Jul 13 2016	SET FOR ARGUMENT on Tuesday, October 11, 2016.
Jul 22 2016	Record requested from the Supreme Court of Colorado.
Aug 19 2016	CIRCULATED.
Aug 29 2016	Brief of respondent Colorado filed. (Distributed)
Sep 6 2016	Brief amicus curiae of United States filed. (Distributed)
Sep 6 2016	Motion of the Acting Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
Sep 6 2016	Brief amicus curiae of Colorado District Attorneys' Council filed. (Distributed)
Sep 6 2016	Brief amici curiae of Indiana, et al. filed. (Distributed)
Sep 6 2016	Brief amicus curiae of Criminal Justice Legal Foundation filed. (Distributed)
Sep 14 2016	Record received from the Supreme Court of Colorado. 1 Envelope partially SEALED and electronic.
Sep 19 2016	Reply of petitioner Miguel Angel Pena-Rodriguez filed. (Distributed)
Sep 26 2016	Motion of the Acting Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
Oct 11 2016	Argued. For petitioner: Jeffrey L. Fisher, Stanford, Cal. For respondent: Frederick R. Yarger, Solicitor General, Denver, Colo.; and Rachel P. Kovner, Assistant to the Solicitor General, Department of Justice, Washington, D. C. (for United States, as amicus curiae.)
Mar 6 2017	Judgment REVERSED and case REMANDED. Kennedy, J., delivered the opinion of the Court, in which Ginsburg, Breyer, Sotomayor, and Kagan, JJ., joined. Thomas, J., filed a dissenting opinion. Alito, J., filed a dissenting opinion. Alito, J., filed a dissenting opinion, in which Roberts, C. J. and Thomas, J., joined.

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15-606

No. 15-____

NOV 10 2015

IN THE

Supreme Court of the United States

MIGUEL ANGEL PEÑA RODRIGUEZ,

Petitioner,

v.

STATE OF COLORADO,

Respondent.

On Petition for a Writ of Certiorari
to the Colorado Supreme Court

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Most states and the federal government have a rule of evidence generally prohibiting the introduction of juror testimony regarding statements made during deliberations when offered to challenge the jury's verdict. Known colloquially as "no impeachment" rules, they are typically codified as Rule 606(b); in some states, they are a matter of common law.

The question presented is whether a no-impeachment rule constitutionally may bar evidence of racial bias offered to prove a violation of the Sixth Amendment right to an impartial jury.

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Other Authorities

Arterton, Janet Bond, *Unconscious Bias and the Impartial Jury*, 40 Conn. L. Rev. 1023 (2008) 23

Donner, Ted A. & Richard K. Gabriel, Jury Selection Strategy and Science (3d ed. 2014) 23

Gobert, James J. et al., Jury Selection: The Law, Art and Science of Selecting a Jury (3d ed. 2014) 24

Hollander, Nancy & Barbara E. Bergman, Everytrial Criminal Defense Resource Book (2013) 25

Huebner, Benjamin T., Note, *Beyond* Tanner: *An Alternative Framework for Postverdict Juror Testimony*, 81 N.Y.U. L. Rev. 1469 (2006) 9

Kalven, Jr., Harry & Hans Zeisel, The American Jury (1966) 18

Reskin, Barbara F. & Christy A. Visher, *The Impacts of Evidence and Extralegal Factors in Jurors' Decisions*, 20 Law & Soc'y Rev. 423 (1986).....18

Rothstein, Mark A. et al., Employment Law (5th ed. 2014).....28

PETITION FOR A WRIT OF CERTIORARI

Petitioner Miguel Angel Peña Rodriguez respectfully petitions for a writ of certiorari to review the judgment of the Colorado Supreme Court.

OPINIONS BELOW

The opinion of the Colorado Supreme Court (Pet. App. 1a) is published at 350 P.3d 287. The opinion of the Colorado Court of Appeals (Pet. App. 28a) is published at 2012 COA 193. The relevant proceedings and order from the trial court are unpublished.

JURISDICTION

The judgment of the Colorado Supreme Court was entered on May 18, 2015. Pet. App. 1a. The Colorado Supreme Court denied rehearing on June 15, 2015. Pet. App. 87a. On September 10, 2015, Justice Sotomayor extended the time to file this petition for a writ of certiorari to and including November 12, 2015. *See* No. 15A265. This Court has jurisdiction under 28 U.S.C. § 1257(a).

RELEVANT CONSTITUTIONAL PROVISIONS

The Sixth Amendment to the United States Constitution provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right to a . . . trial, by an impartial jury."

The Fourteenth Amendment to the United States Constitution provides in relevant part: "[N]or shall any state deprive any person of life, liberty, or property without due process of law."

STATEMENT OF THE CASE

This case presents a fundamental question concerning the ability of defendants to vindicate their Sixth Amendment right to an impartial jury. At petitioner's criminal trial, a juror injected racial animus into the deliberations – urging, for example, that the jury convict petitioner "because he's Mexican and Mexican men take whatever they want," and that the jury disbelieve petitioner's alibi witness because the witness was Hispanic. Pet. App. 4a-5a. After learning of these statements, petitioner sought a new trial, claiming a violation of his constitutional right to an impartial jury. But a bare majority of the Colorado Supreme Court – deepening a conflict over the issue – held that the Sixth Amendment allows a "no impeachment" rule to bar courts from considering juror testimony of racial bias during deliberations when that testimony is offered to challenge a verdict.

1. In May 2007, a man entered a women's bathroom at a horse-racing track in Colorado and asked the teenage sisters inside if they wanted to drink beer or "party." After they said no, the man turned off the lights, leaving the room dark. As the girls went to leave, the man grabbed one girl's shoulder and began moving his hand toward her breast before she swiped him away. The man also grabbed the other girl's shoulder and buttocks.

The sisters exited the bathroom and reported the incident to their father, a worker at the racetrack. They told him they thought the assailant was another employee at the racetrack, who worked in the nearby horse barn. From that description, their father surmised they were referring to petitioner Miguel Angel Peña Rodriguez. Their father then

reported the incident to on-site security personnel, who contacted the police.

The police pulled petitioner over late that night. They conducted a show-up with petitioner standing on the side of the road and each girl about fifteen feet away, looking through the window of a police cruiser. Both girls identified petitioner as the man who had assaulted them.

2. a. The State charged petitioner with four offenses relating to the incident: one felony count of attempted sexual assault on a victim less than fifteen; one misdemeanor count of unlawful sexual contact; and two misdemeanor counts of harassment. Pet. App. 3a. Petitioner insisted he had been misidentified and demanded a trial.

At voir dire, the trial court and the parties repeatedly asked potential jurors whether they could be "fair" or would "have a feeling for or against" petitioner. Pet. App. 3a. None of the impaneled jurors indicated, in response to these questions, that he or she harbored any racial bias. *Id.*

During trial, the prosecution presented no forensic evidence, focusing instead on pretrial and in-court identifications by the victims. Defense counsel highlighted the short amount of time during which the victims saw their attacker, the suggestibility of the nighttime show-up, and the presence of other Hispanic workers in the area. And petitioner presented an alibi witness, a co-worker – also Hispanic – who testified that he was with petitioner in one of the barns when the charged offenses occurred. Tr. 17 (Feb. 25, 2010). The prosecution responded by urging the jury to "[w]eigh the

credibility of the girls against [the credibility of the alibi witness]." *Id.* 48.

The jury was initially unable to reach a verdict on any of the charges. In response, the judge provided the jurors with Colorado's version of an *Allen* charge – an admonition to keep deliberating to try to reach unanimity. After twelve total hours of deliberations, the jury convicted petitioner on the three misdemeanor charges. Pet. App. 3a. It was unable to reach a verdict on the felony charge. *Id.*

b. After the jurors were dismissed, defense counsel remained in the courthouse to speak with them. Two jurors stayed longer to talk to defense counsel privately. They explained that, during deliberations, another juror had "expressed a bias toward [Petitioner] and the alibi witness because they were Hispanic." Pet. App. 4a (alteration in original).

Shortly thereafter, petitioner asked the court for permission to contact the jurors to obtain affidavits regarding the alleged racially biased statements. The court provided contact information and counsel secured affidavits from the two jurors.

Both affidavits related a number of racially biased statements made by "Juror H.C." In particular, Juror H.C. allegedly said during deliberations:

- "[The defendant] did it because he's Mexican and Mexican men take whatever they want." Pet. App. 4a.
- "[The defendant] was guilty because in [Juror H.C.'s] experience as an ex-law enforcement officer, Mexican men had a bravado that

caused them to believe they could do whatever they wanted with women." *Id.*

- "Mexican men [are] physically controlling of women because they have a sense of entitlement and think they can 'do whatever they want' with women." *Id.*
- "[W]here [Juror H.C.] used to patrol, nine times out of ten Mexican men were guilty of being aggressive toward women and young girls." *Id.*
- "[T]he alibi witness [wasn't] credible because, among other things, he was 'an illegal.'" *Id.* 4a-5a. (The witness had testified during trial that he was a legal resident of the United States. Tr. 14 (Feb. 25, 2010).)

After receiving the affidavits, the trial court acknowledged that Juror H.C. "appear[ed] to be biased based on what he said in the jury room." Tr. 3 (July 20, 2010). But the trial court determined that the juror's expressions of racial animus could "not form the basis of a new trial" because Colorado's no-impeachment rule, codified at Colorado Rule of Evidence (CRE) 606(b), prohibits inquiry into "what happens in the jury room." *Id.*[1]

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[1] CRE 606(b), which is substantively identical to Federal Rule of Evidence 606(b), provides that "[u]pon an inquiry into the validity of a verdict or indictment, a juror may not testify" – save narrow exceptions not relevant here – "as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon his or any other juror's mind or emotions as influencing him to assent to or dissent from the verdict or indictment or concerning his mental processes in

c. Petitioner was sentenced to two years' probation and was required to register as a sex offender. Tr. 24-25 (Nov. 23, 2010).

3. A divided panel of the Colorado Court of Appeals affirmed. Pet. App. 29a. The dissent would have held that "CRE 606(b) must yield to the Sixth Amendment right of [the] defendant." *Id.* 65a. Accordingly, it would have "reversed [petitioner's] conviction and remand[ed] for further proceedings, because the trial court's error is not harmless beyond a reasonable doubt." *Id.*

4. The Colorado Supreme Court affirmed by a 4-3 vote.

The majority acknowledged that this Court has stated that "[t]here may be cases of juror bias so extreme" that applying a no-impeachment rule would abridge a defendant's right to an impartial jury. Pet. App. 16a n.6 (quoting *Warger v. Shauers*, 135 S. Ct. 521, 529 n.3 (2014)). In *Warger* and *Tanner v. United States*, 483 U.S. 107 (1987), this Court held that the Sixth Amendment posed no barrier to ignoring affidavits alleging, respectively, that a juror was biased against a party because her daughter had caused a car accident similar to the one at issue and that jurors were intoxicated during trial. This Court explained that requiring courts to consider testimony on those topics was unnecessary because other safeguards allowed defendants in such situations to adequately protect their right to an impartial jury.

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connection therewith. A juror's affidavit or evidence of any statement by the juror may not be received on a matter about which the juror would be precluded from testifying."

See Warger, 135 S. Ct. at 529; *Tanner*, 483 U.S. at 127 These safeguards were: (1) the ability of trial courts and counsel to observe jurors for signs of misconduct during trial; (2) the potential availability of nonjuror evidence of juror misconduct; (3) the ability of jurors to report misconduct before they reach a verdict; and (4) the ability of judges and counsel to question jurors about potential bias during voir dire. *See id.* But, as the Colorado Supreme Court acknowledged, "neither *Tanner* nor *Warger* involved the exact issue of racial bias." Pet. App. 14a.

Turning to that issue, the majority admitted that at least one of the *Tanner* safeguards (the ability of the court and defense counsel to observe jurors during trial) was unlikely to uncover racial bias. Pet. App. 15a. But the majority held that the "remaining *Tanner* safeguards [are] sufficient to protect a party's constitutional right[]" to a jury untainted by racial animus. *Id.* In addition, the Colorado Supreme Court expressed concern over the policy implications of recognizing a constitutional exception to CRE 606(b). It worried that creating an exception for racial bias would encourage lawyers to harass jurors after trial. *Id.* 15a. The majority was also unable to "discern a dividing line between different *types* of juror bias" and between biased comments of varying "severity." *Id.* 14a-15a. Finally, it feared that "the very potential" for investigation into claims of racial bias "would shatter public confidence in the fundamental notion of trial by jury." *Id.* 13a.

Justice Márquez dissented, joined by Justices Eid and Hood. Pet. App. 16a. Noting that courts are "split" on whether the Sixth Amendment permits no-impeachment rules to bar any consideration of

evidence of racial bias offered to prove a violation of the right to an impartial jury, *id.* 23a n.4, Justice Márquez maintained that the better view is that such rules "must yield to the defendant's constitutional right to an impartial jury," *id.* 18a. She detailed the ways in which the *Tanner* safeguards are "not always adequate to uncover racial bias before the jury renders its verdict." *Id.* 22a-23a. In addition, Justice Márquez argued that the majority's reasoning improperly "elevates general policy interests in the finality of verdicts and in avoiding the potential embarrassment of a juror over the defendant's fundamental constitutional right to a fair trial," thereby undermining "public confidence in our jury trial system." *Id.* 18a.

5. The Colorado Supreme Court denied rehearing, with two justices noting that they would have granted the petition. Pet. App. 87a.

REASONS FOR GRANTING THE WRIT

Federal courts of appeals and state courts of last resort are intractably divided over whether the Sixth Amendment permits "no impeachment" rules to bar juror testimony regarding racially biased statements made during deliberations when offered to prove a violation of the right to an impartial jury. The Court should use this case – with a clean set of facts arising on direct review – to resolve the conflict on this manifestly important question and hold that no-impeachment rules cannot bar courts from considering juror affidavits to determine whether racial bias unconstitutionally infected jury deliberations.

I. Federal And State Courts Are Intractably Divided Over Whether The Sixth Amendment Requires Consideration Of Juror Testimony That Racial Bias Infected Deliberations.

Most states' no-impeachment rules, like Federal Rule of Evidence 606(b), render jurors incompetent to testify as to any statement made during deliberations evincing any sort of "bias" or partiality on the part of jurors. *See Warger v. Shauers*, 135 S. Ct. 521, 529-30 (2014) (federal rule); Benjamin T. Huebner, Note, *Beyond* Tanner: *An Alternative Framework for Postverdict Juror Testimony*, 81 N.Y.U. L. Rev. 1469, 1487, app. (2006) (state rules). Nonetheless, this Court has cautioned that "there might be instances in which such testimony . . . could not be excluded 'without violating the plainest principles of justice.'" *McDonald v. Pless*, 238 U.S. 264, 268-69 (1915) (quoting *United States v. Reid*, 53 U.S. (1 How.) 361, 366 (1851)). And just last Term – confronted with the argument that construing Rule 606(b) in such a categorical manner would render it unconstitutional as applied to claims of racial bias, *see* Tr. of Oral Arg. at 20, 31-32, 43, *Warger*, 135 S. Ct. 521 (No. 13-517) – this Court reserved the question whether "[t]here may be cases of juror bias so extreme that, almost by definition, the jury trial right has been abridged." *Warger*, 135 S. Ct. at 529 n.3.

Courts have become openly and sharply divided over this question. *See, e.g., Kittle v. United States*, 65 A.3d 1144, 1153 & n.9 (D.C. 2013) (detailing the split); *State v. Brown*, 62 A.3d 1099, 1109-10 (R.I. 2013) (same); Pet App. 23a n.4 (Márquez, J., dissenting) (same). The Colorado Supreme Court

here joined one federal court of appeals and one state court of last resort in holding that no-impeachment rules are constitutional even when applied to juror testimony regarding racially biased statements. *See* Pet. App. 16a. By contrast, two federal courts of appeals and seven state courts of last resort hold – as the dissent contended below – that the Sixth Amendment prevents courts from barring juror testimony on such statements.

1. *The minority view.* In holding that excluding testimony of racially biased statements made during deliberations does not raise a constitutional problem, the Colorado Supreme Court embraced the position previously adopted by the Tenth Circuit and the Pennsylvania Supreme Court.

In *United States v. Benally*, 546 F.3d 1230 (10th Cir. 2008), *cert. denied*, 558 U.S. 1051 (2009), the government prosecuted a Native American for assault. Following trial, a juror alleged that the foreman had said during deliberations that "'[w]hen Indians get alcohol, they all get drunk,' and that when they get drunk, they get violent." *Id.* at 1231 (alteration in original). The district court granted a new trial on this basis, but the Tenth Circuit reversed and reinstated the conviction. *Id.* at 1241-42. After making clear that Rule 606(b) applied to the juror's testimony, *id.* at 1234-38, the Tenth Circuit rejected the argument "that Rule 606(b) is unconstitutional as applied in a case" in which "racially biased statements were made" during deliberations, *id.* at 1241. That left the defendant with no admissible evidence to support his Sixth Amendment claim. *Id.* at 1233; *see also United States v. Benally*, 560 F.3d 1151 (10th Cir. 2009)

(denying rehearing en banc, with three judges dissenting).

In *Commonwealth v. Steele*, 961 A.2d 786 (Pa. 2008), the Pennsylvania Supreme Court likewise refused to recognize an exception to the state's no-impeachment rule for juror testimony regarding racial bias. Rejecting a defendant's argument that his "right to a fair and impartial jury [was] violated" by a juror's "troubling" statements indicating racial bias, the Pennsylvania Supreme Court held that Pennsylvania's Rule 606(b) barred the juror's testimony. *Id.* at 807-08; *see also Smart v. Folino*, No. 3:CV-10-1447, 2015 WL 1525528, at *6-8 (M.D. Pa. Apr. 2, 2015) (observing that *Steele* precludes Pennsylvania courts from creating a constitutional exception to the state's no-impeachment rule with respect to racially biased statements).[2]

2. *The majority view.* The First Circuit, in *United States v. Villar*, 586 F.3d 76 (1st Cir. 2009), rejected the Tenth Circuit's analysis in *Benally* and articulated the majority position. Following the

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[2] Two more federal courts of appeals have indicated that they would refuse to hold a no-impeachment rule unconstitutional as applied to juror testimony regarding racial bias. *See Williams v. Price*, 343 F.3d 223, 235 (3d Cir. 2003) (declining to afford habeas relief because "the Supreme Court's decision in *Tanner* implies that the Constitution does not require the admission of evidence [of racial bias] that falls within Rule 606(b)'s prohibition"); *United States v. Duzac*, 622 F.2d 911, 913 (5th Cir. 1980) (holding – in response to a juror's allegation that "certain prejudices" had infected the jury's deliberations – that a jury's "verdict may not be disturbed if it is later learned that personal prejudices were not put aside during deliberations").

conviction of a Hispanic man for robbery, one juror alleged that another had said, during deliberations, "I guess we're profiling but they cause all the trouble." *Id.* at 78. The First Circuit acknowledged that the juror's testimony fell within Rule 606(b)'s prohibition. *Id.* at 84. But the First Circuit nonetheless remanded the case to the district court with instructions to consider the juror's allegations, holding that when defendants allege "racial or ethnic bias during jury deliberations," courts must assess – "under the Sixth Amendment and the Due Process Clause of the United States Constitution" – "whether there is a substantial probability that any such comments made a difference in the outcome of the trial." *Id.* at 79, 87-88.[3]

The Rhode Island Supreme Court likewise has rejected *Benally*. In *State v. Brown*, 62 A.3d 1099 (R.I. 2013), several jurors alleged that another had referred to the Native American defendants as "those

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[3] Courts sometimes describe the constitutional concern here in terms of "due process" because "[t]he right to an impartial jury is guaranteed by both the Sixth Amendment, made applicable to the States through the Fourteenth Amendment, and by principles of due process." *Turner v. Murray*, 476 U.S. 28, 36 n.9 (1986) (plurality opinion). There is no difference, however, between the two sources of the right. This Court originally characterized the right to an impartial jury in state criminal cases as guaranteed by due process because it had not yet held that the Sixth Amendment's explicit guarantee of an impartial jury applied to the states. *See Irvin v. Dowd*, 366 U.S. 717, 721-22 (1961). Once this incorporation was achieved, the Court made clear that the right emanated equally from the Sixth Amendment and the Due Process Clause. *See Ristaino v. Ross*, 424 U.S. 589, 595 n.6 (1976).

people" and had mockingly beat water bottles "like tom-tom drums." *Id.* at 1110. Adopting the First Circuit's analysis in *Villar*, the Rhode Island Supreme Court explained that Rule 606(b) could not "preclude the admission" of juror testimony on racial bias during deliberations "where necessary to protect a defendant's right to a fair trial by an impartial jury – a right guaranteed by the federal and state constitutions." *Id.* It therefore upheld the trial court's decision to consider whether the statements demonstrated that "racial bias infected the jury's deliberative process." *Id.* at 1107, 1110.

The D.C. Court of Appeals similarly has rejected *Benally*. In *Kittle v. United States*, 65 A.3d 1144 (D.C. 2013), a juror's post-verdict letter to the trial judge stated that some of the other jurors had felt that "all 'blacks' are guilty regardless." *Id.* at 1147-48. The D.C. Court of Appeals concluded that the Sixth Amendment impartial jury right requires a "constitutional exception" allowing courts "to consider juror testimony in certain 'rare and exceptional circumstances' where claims of racial or ethnic bias amongst jurors implicate the defendant's right to trial by an impartial jury." *Id.* at 1152, 1155-56 (quoting *Villar*, 586 F.3d at 88).

The Massachusetts Supreme Judicial Court has repeatedly determined that the Sixth Amendment requires consideration of juror testimony alleging racially biased statements "because 'the possibility . . . that the defendant did not receive a trial by an impartial jury, which was his fundamental right, cannot be ignored.'" *Commonwealth v. McCowen*, 939 N.E.2d 735, 763-64 (Mass. 2010) (quoting *Commonwealth v. Laguer*, 571

N.E.2d 371, 376 (Mass. 1991)). In *Laguer*, for example, the defendant submitted a post-trial affidavit from a juror alleging that "[t]he jury deliberations were plagued by racism." 571 N.E.2d at 375. Even though the state's no-impeachment rule covered this evidence, the Massachusetts Supreme Judicial Court ordered the trial court to hold an evidentiary hearing and instructed that "[i]f the affidavit is found to be essentially true in that regard, the defendant shall be entitled to a new trial." *Id.* at 377.

One other federal court of appeals and four more state courts of last resort have aligned themselves with the majority view, invoking the Constitution to hold that no-impeachment rules cannot bar evidence of racial bias offered to show violations of the right to an impartial jury. *See Shillcutt v. Gagnon*, 827 F.2d 1155, 1158-59 (7th Cir. 1987) (even though juror testimony that racial bias infected jury deliberations falls within Rule 606(b), "due process" requires courts to determine "whether there [was] a substantial probability that the alleged racial slur made a difference in the outcome of the trial"); *Fisher v. State*, 690 A.2d 917, 918, 920 (Del. 1996) (federal constitutional "right to trial by an impartial jury" requires consideration of juror testimony indicating that "the issue of race was improperly considered" during deliberations); *Spencer v. State*, 398 S.E.2d 179, 184-85 (Ga. 1990), ("'due process'" requires courts to "disregard[]" the no-impeachment rule when necessary to determine whether "racial bias materially affected the jury's decision to convict" (quoting *Shillcutt*, 827 F.2d at 1159)), *cert. denied*, 500 U.S. 960 (1991); *State v. Hidanovic*, 747 N.W.2d 463, 473-74 (N.D. 2008) ("federal constitutional right

to a fair trial by an impartial jury" requires courts to consider "evidence of racial and ethnic bias" that "would otherwise be inadmissible under a rule similar to N.D.R.Ev. 606(b)"); *State v. Hunter*, 463 S.E.2d 314, 316 (S.C. 1995) ("due process" requires no-impeachment rule to yield in cases involving "allegations of racial prejudice" during deliberations (citing *Shillcutt*, 827 F.2d at 1159)).[4]

3. Until now, this Court has not been presented with the full scope of the split over the question presented. Although the defendant sought certiorari in *Benally*, his petition did not identify any of the state courts of last resort on either side of the divide; it set forth only a two-to-one split among the federal courts of appeals. *See* Petition for Writ of Certiorari at 16-17, *Benally*, No. 08-4009. And following the denial of that petition, three new jurisdictions have joined opposite sides of the split. *See* Pet. App. 16a (decision below; following *Benally*); *Kittle*, 65 A.3d 1144 (rejecting *Benally*); *Brown*, 62 A.3d 1099 (same). Once all of these cases are taken into account, it is clear that more than sufficient percolation has

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[4] The Ninth Circuit and the Wisconsin Supreme Court also have suggested their support for this position. *See United States v. Henley*, 238 F.3d 1111, 1120-21 (9th Cir. 2001) (finding "persuasive those cases that have exempted evidence of racial prejudice from Rule 606(b)'s juror incompetency doctrine," including those decided on Sixth Amendment grounds); *State v. Shillcutt*, 350 N.W.2d 686, 695 (Wis. 1984) (indicating that constitutional considerations would require a no-impeachment rule to yield when there is a "'substantial likelihood' that the defendant was prejudiced by the influence of racial bias in the jury room").

occurred, and that there is no hope of uniformity unless this Court intervenes.

Indeed, the crux of the conflict involves a question only this Court can answer: how the factors this Court enunciated in *Tanner* apply to juror testimony regarding racial bias. Some courts believe that "[t]he safeguards that the Court relied upon for exposing the drug and alcohol use amongst jurors in *Tanner* are also available to expose racial biases." *Benally*, 546 F.3d at 1240. Others, holding that no-impeachment rules cannot constitutionally be applied in this setting, have highlighted what they see as "the shortcomings of the *Tanner* protections in preventing the influence of jurors' racial or ethnic bias on a verdict." *Kittle*, 65 A.3d at 1155. Lower courts have forthrightly "struggled" over this issue long enough, *Villar*, 586 F.3d at 85, and now need "a clear command from the Supreme Court," Pet. App. 16a n.6.

II. The Question Presented Is Critically Important To The Administration Of Criminal Justice.

The question presented merits this Court's attention. This Court has repeatedly granted certiorari to craft and refine rules aimed at preventing racial bias from seeping into the jury room. *See, e.g.*, *Foster v. Chatman*, No. 14-8349 (argued Nov. 2, 2015) (prosecutor's use of peremptory challenges based on race); *Snyder v. Louisiana*, 552 U.S. 472, 474 (2008) (same); *Miller-El v. Dretke*, 545 U.S. 231, 266 (2005) (same); *Georgia v. McCollum*, 505 U.S. 42, 44 (1992) (defendant's use of peremptory challenges based on race); *Turner v. Murray*, 476 U.S. 28, 33 (1986) (ability to ask questions at voir

dire regarding racial bias in capital case); *Rose v. Mitchell*, 443 U.S. 545, 547 (1979) (racial bias in selection of grand jury foreman); *Ham v. South Carolina*, 409 U.S. 524, 529 (1973) (ability to ask questions at voir dire regarding racial bias in non-capital case).

The same imperative for this Court's guidance exists here. The right to trial by an impartial jury is a cornerstone of our system of criminal justice, ensuring "tribunals in which every defendant stands equal before the law." *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963). Thus, when racial prejudice infects a jury's decision whether to convict, the integrity of the criminal justice system is brought "into direct question," *Rose*, 443 U.S. at 563 (1979). Whatever conciliation must be made between that grave threat to the legitimacy of the criminal justice system and the interest in preserving "the secrecy of jury deliberations," Pet. App. 2a, should come from this Court – not an inconsistent hodgepodge of lower court cases.

III. This Case Presents An Ideal Vehicle For Resolving The Conflict.

For two reasons, this case is a particularly suitable vehicle for resolving whether a no-impeachment rule can bar evidence of racial bias during deliberations offered to prove a violation of the right to an impartial jury.

First, this case arises on direct review from the denial of petitioner's motion for a new trial. It thus possesses none of the complications that often accompany habeas cases. In addition, petitioner properly presented his constitutional claim in the state-court system, *see* Pet. App. 11a n.5, and the

majority and dissent in the Colorado Supreme Court engaged in robust discussion on the merits, *see id.* 11a-27a.

Second, if this Court holds that a no-impeachment rule is unconstitutional as applied to evidence of racial bias during deliberations, petitioner will likely be entitled to a new trial. The juror affidavits he submitted, in conjunction with the circumstances of his trial, indicate that racial bias influenced the jury's decision to convict him. Juror H.C. did not just utter an offhand comment related to race. Instead, his alleged statements "were directly tied to the determination of the defendant's guilt." Pet. App. 26a (Márquez, J., dissenting). He conveyed a strong belief that Hispanics are more likely to be guilty of the crimes with which petitioner was charged and discounted petitioner's defense because he erroneously assumed that the alibi witness was "an illegal." *Id.* 4a-5a.

What is more, the jury was initially deadlocked on all four charges, reaching a verdict on three of them only after the judge admonished the jurors to keep deliberating. The jury's difficulty in reaching a decision may have "liberat[ed]" it to rely on non-evidentiary factors such as race. *Cf.* Harry Kalven, Jr. & Hans Zeisel, The American Jury 164-65 (1966) (suggesting that jurors may rely on nonevidentiary factors in cases where the evidence is close); Barbara F. Reskin & Christy A. Visher, *The Impacts of Evidence and Extralegal Factors in Jurors' Decisions*, 20 Law & Soc'y Rev. 423, 434-37 (1986) (extending this theory to cases of sexual assault).

IV. The Colorado Supreme Court's Decision Is Incorrect.

Contrary to the Colorado Supreme Court's holding, a no-impeachment rule is unconstitutional when applied to juror testimony regarding racial bias offered to prove a violation of the Sixth Amendment right to an impartial jury.

A. Courts Cannot Adequately Protect The Sixth Amendment Right To A Jury Free Of Racial Bias Without Post-Verdict Juror Testimony

This Court has consistently made clear that rules of evidence – even rules with deep common-law pedigree – must yield when necessary to effectuate a criminal defendant's Sixth Amendment or due process rights. In *Chambers v. Mississippi*, 410 U.S. 284 (1973), for example, the Court held that the Sixth Amendment and Due Process Clause trump the hearsay rule and the common-law rule categorically prohibiting a party from impeaching his own witness insofar as those rules bar reliable testimony vital to ascertaining guilt. *Id.* at 302. Even though "perhaps no rule of evidence has been more respected or more frequently applied" over the centuries than the hearsay rule, this Court explained, the rule "may not be applied mechanistically to defeat" the constitutional right to present a defense. *Id.*; *see also Holmes v. South Carolina*, 547 U.S. 319, 324-26 (2006) (reaffirming *Chambers*).

Similarly, in *Rock v. Arkansas*, 483 U.S. 44 (1987), this Court held that the categorical rule shared by many states "excluding a criminal defendant's hypnotically refreshed testimony" must

yield to the "constitutional right to testify in [one's] own defense" when the rule would "disable a defendant from presenting her version of the events for which she is on trial." *Id.* at 49, 61. Finally, in *Washington v. Texas*, 388 U.S. 14 (1967), this Court held that the Sixth Amendment trumps the common-law rule precluding defendants from calling alleged accomplices to testify on their behalf. *Id.* at 20-23. Despite the rule's venerable origins predating the founding era, this Court explained that the rule must give way when necessary to vindicate the right enshrined in the Compulsory Process Clause allowing defendants to secure testimony "relevant and material to the defense." *Id.* at 23.

The same basic analysis applies here: when a no-impeachment rule precludes a court from considering evidence that racial bias infected jury deliberations, the rule infringes on the right to an impartial jury without sufficient justification.

1. There can be no dispute that the Sixth Amendment right to an impartial jury is violated where a juror expresses an intention to convict based on "racial animus." *Georgia v. McCollum*, 505 U.S. 42, 58 (1992). Injecting such prejudicial reasoning into the jury room strikes at the heart of the constitutional commitment to "a jury capable and willing to decide the case solely on the evidence before it." *Smith v. Phillips*, 455 U.S. 209, 217 (1982). The only question, therefore, is whether barring post-verdict juror testimony concerning racial bias during deliberations unduly impedes this right. We now turn to that question.

2. This Court has held that the Sixth Amendment permits no-impeachment rules to bar

testimony regarding a juror's intoxication or a juror's bias against a party because her daughter had caused a car accident similar to the one at issue. *See Tanner v. United States*, 483 U.S. 107, 113-15, 127 (1987); *Warger v. Shauers*, 135 S. Ct. 521, 529 (2014). This Court did not question the reliability or probative value of such juror testimony. But the Court identified four "aspects of the trial process" – now known as the *Tanner* factors – that generally allow defendants in those situations to effectuate their right to an impartial jury while still preserving the secrecy of jury deliberations. *Id.* These safeguards are: (1) the ability to observe the jury during trial; (2) the ability to consider evidence besides juror testimony concerning misconduct during deliberations; (3) the ability of other jurors to report misconduct before a verdict; and (4) the ability to inquire into potential bias during voir dire. *Id.*

At the same time, this Court has stressed that "there might be instances in which such testimony of . . juror [misconduct] could not be excluded without 'violating the plainest principles of justice.'" *McDonald v. Pless*, 238 U.S. 264, 268-69 (1915) (quoting *United States v. Reid*, 53 U.S. (1 How.) 361, 366 (1851)). And again last year, this Court suggested that "[t]here may be cases of juror bias so extreme" that applying the no-impeachment rule would run afoul of the Sixth Amendment. *Warger*, 135 S. Ct. at 529 n.3.

For two reasons, racial bias is the extreme case that requires a constitutional exception.

a. The four *Tanner* safeguards are insufficient to protect the accused's right to a verdict untainted by racial prejudice.

First, the Colorado Supreme Court itself acknowledged that racial bias "is less readily visible than intoxication, [which] mean[s] . . . the ability of the court to observe the jury's behavior during trial" is unlikely to assist the court or counsel in discovering that bias. Pet. App. 15a.

Second, unlike alcohol consumption, racial bias during deliberations cannot be established using barroom receipts or other forms of physical evidence. *See Tanner*, 483 U.S. at 127 (suggesting that "records of club where jurors dined" could establish juror intoxication during deliberations (describing *United States v. Taliaferro*, 558 F.2d 724, 725-26 (4th Cir. 1977))). Nor can testimony from nonjurors reveal racially biased statements made in the jury room, given the privacy of deliberations and the inability of nonjurors to report what they cannot see. *United States v. Villar*, 586 F.3d 76, 87 (1st Cir. 2009). Testimony from jurors themselves, therefore, is not only the strongest possible evidence concerning racial bias; it is the *only* evidence likely to be available. *See Rock*, 483 U.S. at 57 (evidence rule unconstitutional as applied because it "virtually prevented" defendant from offering any proof in support of her defense).

Third, jurors are unlikely to come forward with allegations of racial bias before deliberations are complete. Taking such action requires that jurors break ranks in a setting that may already be highly stressful or contentious. *See Kittle v. United States*, 65 A.3d 1144, 1155 (D.C. 2013). Jurors are therefore apt to put off any such reporting until after reaching a verdict, especially because they may not know that Rule 606(b) treats post-verdict reports so differently from pre-verdict reports. *See id.*

Moreover, as one federal judge has observed, jurors may stay silent during deliberations because they rationalize that racism will not impact the verdict and thus conclude that nothing would be gained by speaking out. Janet Bond Arterton, *Unconscious Bias and the Impartial Jury*, 40 Conn. L. Rev. 1023, 1033 (2008). But after reaching a guilty verdict, the implications of a juror's racial bias may weigh heavy on other jurors' consciences, prompting those jurors to come forward.

Fourth, there are inherent limitations on the capacity of voir dire to prevent racial bias from entering the jury room in the first place. Criminal defendants are not always allowed at voir dire to inquire into racial bias. *Rosales-Lopez v. United States*, 451 U.S. 182, 190 (1981) (plurality opinion). And when defendants *are* permitted to inquire specifically into racial biases, even the Colorado Supreme Court recognized that defense counsel is often well advised not to pose such direct questions. Pet. App. 11a n.5. For one thing, such inquiries "might be viewed as insulting to jurors or as raising an issue defense counsel does not want to highlight." *Villar*, 586 F.3d at 87 n.5; *see also* Ted A. Donner & Richard K. Gabriel, Jury Selection Strategy and Science § 34:1 (3d ed. 2014) ("Race and gender bias may be appropriate reasons for excusing prospective jurors, but the subjects should probably not be specifically addressed, in any voir dire, unless the facts of the case suggest that racism could be a dispositive factor."). This places questions about racial prejudice on much different footing from inquiries about less controversial forms of bias – such as the sympathy of the juror in *Warger* for someone who caused a car accident.

Furthermore, asking direct questions about racial bias is usually ineffective anyway. Unlike with other forms of partiality, jurors are unlikely to self-identify as racially prejudiced or to make racially biased statements during voir dire. A juror "may have an interest in concealing his own bias [or he] may be unaware of it." *Smith*, 455 U.S. at 221-22 (O'Connor, J., concurring). Either way, "it will rarely be productive to ask jurors directly if they will be prejudiced because of the party's race, as a negative answer will virtually always be forthcoming." James J. Gobert et al., Jury Selection: The Law, Art and Science of Selecting a Jury § 7:41 (3d ed. 2014).

Defense counsel are therefore typically left at voir dire to pose only general questions about potential bias. But as petitioner's trial demonstrates, such indirect inquiries seldom uncover racial animus. Pet. App. 3a; *see also* Gobert et al., *supra*, § 7:44 ("Whether such general questioning is sufficient for the purpose of exposing racial prejudice is debatable."). Few are prone, in the face of open-ended questions, to volunteer that they harbor socially repugnant views.

b. Even if the *Tanner* factors were generally capable of preventing racial bias from infecting the jury room, racial bias would still stand apart from other forms of partiality. Racial animus is an "especially pernicious" form of prejudice that the Constitution is uniquely concerned with eradicating from the criminal justice system. *Rose v. Mitchell*, 443 U.S. 545, 555-56 (1979); *see also McCollum*, 505 U.S. at 58 (decision-making based on "racial animus" intolerably "distort[s] our system of criminal justice"). Accordingly, even a single case of racial bias

influencing a jury's decision to convict "violat[es] the plainest principles of justice." *McDonald*, 238 U.S. at 268-69 (quoting *Reid*, 53 U.S. (1 How.) at 366). Faced with reliable evidence of such a blatant constitutional violation, a court is duty-bound to consider the evidence and, if true, provide a remedy.

B. The Right To A Jury Free Of Racial Bias Overrides The Justifications For No-Impeachment Rules.

In addition to discussing the *Tanner* safeguards, the Colorado Supreme Court offered three policy justifications for refusing to hold Rule 606(b) unconstitutional as applied to allegations of racial bias. These rationales do not justify disregarding such egregious violations of defendants' constitutional right to an impartial jury.

1. The Colorado Supreme Court expressed concern that allowing testimony regarding racial bias would cause lawyers to harass jurors. Pet. App. 13a-14a. But prosecutors and defense lawyers already have ample reason to talk to jurors after they have rendered their verdict. Attorneys typically stay after the verdict to ask "what evidence [jurors] found compelling" and gain "valuable information" for future trials. Nancy Hollander & Barbara E. Bergman, Everytrial Criminal Defense Resource Book § 7:1 (2013). Furthermore, most no-impeachment rules allow defendants to challenge verdicts with juror testimony revealing that the jurors relied on "extraneous" information, such as almanacs or home experiments. *See, e.g.*, Fed. R. Evid. 606(b)(2). In light of these realities, courts have developed various means of preventing juror harassment. *See, e.g.*, Colo. R. Prof'l Conduct

3.5(c)(3) (forbidding communications with jurors after discharge of the jury if "the communication involves misrepresentation, coercion, duress or harassment"). There is no reason why those tools would not be equally effective in this context.

Indeed, many jurisdictions already exempt evidence of racial bias from their no-impeachment rules – either on constitutional grounds, *see supra* at 11-15, or as a matter of state law, *see, e.g.*, *State v. Johnson*, 951 A.2d 1257, 1279-80 (Conn. 2008). And no one disputes that the jury system continues to thrive in these jurisdictions. In Connecticut, for example, judges have conducted inquiries into allegations of jurors' racial bias for the past seventeen years, and the courts have developed detailed protocols for eliciting relevant information. *See id.* at 1279; *State v. Santiago*, 715 A.2d 1, 22 (Conn. 1998). Massachusetts courts have been conducting such inquiries for twenty-four years. *See Commonwealth v. McCowen*, 939 N.E.2d 735, 765-66 (Mass. 2010); *Commonwealth v. Laguer*, 571 N.E.2d 371, 375-76 (Mass. 1991). And Minnesota has allowed such inquiries for thirty-five years. *State v. Pederson*, 614 N.W.2d 724, 731 (Minn. 2000); *State v. Callender*, 297 N.W.2d 744, 746 (Minn. 1980); *State v. Watkins*, 526 N.W.2d 638, 640-42 (Minn. Ct. App. 1995). Any argument that creating a constitutional exception to Rule 606(b) for racial bias would cause practical problems should have to explain why such problems have not arisen in the real-life experiences of these jurisdictions. Yet neither the Colorado

Supreme Court nor any other court has attempted to do so.[5]

2. The Colorado Supreme Court also maintained that if it held Rule 606(b) unconstitutional as applied to evidence of racial bias, courts would be unable to "discern a dividing line between different *types* of juror bias" or between racially biased comments of varying "severity." Pet. App. 14a-15a. Not so.

a. This Court has shown when enforcing an array of constitutional protections that it is possible to remedy racial bias at trial without triggering slippery slope problems. For instance, although states traditionally have "wide discretion" in compiling grand jury rosters, *see, e.g.*, *Norris v. Alabama*, 294 U.S. 587, 593 (1935), this Court has held that courts must ensure that "members of a racial group [have not been] purposefully . excluded." *Rose*, 443 U.S. at 556. Similarly, "a prosecutor ordinarily is entitled to exercise permitted peremptory challenges for any reason at all," *Batson v. Kentucky*, 476 U.S. 79, 89 (1986) (internal quotation marks omitted), including bias against any group subject only to rational-basis protection, *see J.E.B. v. Alabama*, 511 U.S. 127, 143 (1994). But this Court has held that courts must ensure that racial prejudice does not infect the selection of a petit jury. *See Batson*, 476 U.S. at 89. And while voir dire is usually left to the "sound

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[5] This Court has also noted that no-impeachment rules are valuable because they promote "full and frank discussion in the jury room." *Tanner*, 483 U.S. at 120. But there can be no valid interest in creating breathing space for jurors to argue that defendants should be convicted because of their race.

discretion" of trial courts, *Ristaino v. Ross*, 424 U.S. 589, 594 (1976) (quoting *Connors v. United States*, 158 U.S. 408, 413 (1895)), this Court has recognized that a trial court must question prospective jurors specifically about racial prejudice when there is "a significant likelihood that racial prejudice might infect [a defendant's] trial." *Id.* at 598. There is nothing about jury deliberations that would impede a similarly race-specific approach.

b. Neither would courts be forced to "make arbitrary judgments that hinge on the severity of a particular juror's impropriety," Pet. App. 15a. Courts already regularly hold post-trial hearings to assess "allegations of [other types of] juror partiality" and "to determine the effect of such occurrences when they happen." *See Smith*, 455 U.S. at 215-17. Courts are equally well equipped to determine when racial prejudice actually compromised a juror's impartiality.

For example, when making the comparable assessment whether racial bias motivated an adverse employment decision, "courts must distinguish between . . . 'direct evidence' [of discrimination] and 'stray remarks' in the workplace that do not reflect upon animus." Mark A. Rothstein et al., Employment Law § 2.7, at 289 (5th ed. 2014). While "direct evidence of animus relates to the actor's state of mind at the time of making an adverse decision, a stray remark is simply a prejudicial comment that does not bear upon the challenged employment decision." *Id. Compare, e.g., Brown v. J. Kaz, Inc.*, 581 F.3d 175, 183 (3d Cir. 2009) (manager's statement "you ain't nothing but the N word" to African-American independent contractor constituted "direct evidence of discrimination"), *with Perry v.*

Woodward, 199 F.3d 1126, 1134 (10th Cir. 1999) ("isolated, disparaging comments" about Hispanics insufficient to support a racial discrimination claim because there was no "nexus between [the] racist comments and [the employee's] discharge").

Courts are equally capable in the context of impartial jury claims of distinguishing "stray comment[s]" from racist statements "directly tied to the determination of the defendant's guilt." Pet. App. 26a (Márquez, J., dissenting); *see also Villar*, 586 F.3d at 87-88 (emphasizing that trial judges are well situated to identify "stray or isolated off-base statement[s]" when "determin[ing] the probability of prejudice from an inappropriate racial or ethnic comment"); *State v. Brown*, 62 A.3d 1099, 1111 (R.I. 2013) (denying relief because "none of the jurors [in this case] uttered racial slurs, and none explicitly or implicitly suggested that Brown's racial or ethnic background should factor into the jury's decision-making process").

3. Finally, the Colorado Supreme Court suggested that allowing the Sixth Amendment to trump the no-impeachment rule in the context of racial bias "would shatter public confidence in the fundamental notion of trial by jury." Pet. App. 13a. But acquiescence to racial bias in the jury room is the far greater threat to the legitimacy of our criminal justice system. As this Court has explained, "[t]he purpose of the jury system is to impress upon the criminal defendant and the community as a whole that a verdict of conviction or acquittal is given in accordance with the law by persons who are fair." *Powers v. Ohio*, 499 U.S. 400, 413 (1991). Thus, there is "[n]o surer way . . . to bring the processes of justice into disrepute" than to

allow courts to turn a blind eye when deliberations have been infected with racial bias. *Aldridge v. United States*, 283 U.S. 308, 315 (1931); *see also* Pet. App. 18a (Márquez, J., dissenting) ("Although the majority believes that this result is required to preserve public confidence in our jury trial system, in my view, it has precisely the opposite effect.").

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

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APPENDIX

APPENDIX A

The Supreme Court of the State of Colorado
2 East 14th Avenue • Denver, Colorado 80203

2015 CO 31

Supreme Court Case No. 13SC9
Certiorari to the Colorado Court of Appeals
Court of Appeals Case No. 11CA34

Petitioner:
Miguel Angel Pena-Rodriguez,

v.

Respondent:
The People of the State of Colorado.

Judgment Affirmed
en banc
May 18, 2015

Attorneys for Petitioner:
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CHIEF JUSTICE RICE delivered the Opinion of the Court.

JUSTICE MÁRQUEZ dissents, and **JUSTICE EID** and **JUSTICE HOOD** join in the dissent.

This case involves the interplay between two fundamental tenets of the justice system: protecting the secrecy of jury deliberations and ensuring a defendant's constitutional right to an impartial jury. After entry of a guilty verdict, defense counsel obtained juror affidavits suggesting that one of the jurors exhibited racial bias against the defendant during deliberations. The trial court refused to consider these affidavits, finding that Colorado Rule of Evidence ("CRE") 606(b) barred their admission, and the court of appeals affirmed. *People v. Pena-Rodriguez*, 2012 COA 193, ¶3, __ P.3d __. We granted certiorari to consider whether CRE 606(b) applies to such affidavits and, if so, whether the Sixth Amendment nevertheless requires their admission.[1]

We hold that the affidavits regarding the juror's biased statements fall within the broad sweep of CRE 606(b) and that they do not satisfy the rule's "extraneous prejudicial information" exception. We further hold that the trial court's application of CRE 606(b) did not violate the defendant's Sixth Amendment right to an impartial jury. Accordingly, we affirm the judgment of the court of appeals.

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[1] Specifically, we granted certiorari to consider: "Whether C.R.E. 606(b) bars the admission of juror statements showing evidence of racial bias made during jury deliberations, and if so, whether the defendant's constitutional right to a fair trial nevertheless requires such statements' admission."

I. Facts and Procedural History

In May 2007, a man made sexual advances toward two teenage girls in the bathroom of the horse-racing facility where Petitioner Miguel Angel Pena-Rodriguez worked. Shortly thereafter, the girls identified Petitioner as the assailant during a one-on-one showup. The People subsequently charged Petitioner with one count of sexual assault on a child – victim less than fifteen; one count of unlawful sexual contact – no consent; and two counts of harassment – strike, shove, or kick. After a preliminary hearing, the court bound over the first count as attempted sexual assault on a child – victim less than fifteen.[2]

At the start of a three-day trial, the jury venire received a written questionnaire, which inquired, "Is there anything about you that you feel would make it difficult for you to be a fair juror in this case?" During voir dire, the judge asked the panel, "Do any of you have a feeling for or against [Petitioner] or the Prosecution?" Later, defense counsel asked the venire whether "this is simply not a good case for them to be a fair juror." None of the jurors subsequently impaneled answered any of these questions so as to reflect racial bias. The jury ultimately found Petitioner guilty of the latter three counts but failed to reach a verdict on the attempted sexual assault charge.

Two weeks later, Petitioner filed a motion for juror contact information, alleging that "some members of the jury used ethnic slurs in the course of

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[2] The People also charged Petitioner with driving under the influence, but they voluntarily dismissed that charge prior to trial.

deliberations." The trial court ordered Petitioner to submit affidavits regarding the "'who, what, when, and where' of the allegations of juror misconduct." Petitioner's counsel subsequently filed an affidavit averring that, shortly after entry of the verdict, two jurors informed her that "some of the other jurors expressed a bias toward [Petitioner] and the alibi witness because they were Hispanic."[3] The trial court then authorized Petitioner's counsel to contact these two jurors, but only to secure affidavits regarding their "best recollection of exactly what each 'biased' juror stated about [Petitioner] and/or the alibi witness."

Thereafter, Petitioner submitted affidavits from jurors M.M. and L.T., both of whom alleged that juror H.C. made racially biased statements during deliberations. According to M.M., H.C. said that "I think he did it because he's Mexican and Mexican men take whatever they want." She also stated that H.C. "made other statements concerning Mexican men being physically controlling of women because they have a sense of entitlement and think they can 'do whatever they want' with women." L.T. stated that H.C. "believed that [Petitioner] was guilty because in his experience as an ex-law enforcement officer, Mexican men had a bravado that caused them to believe they could do whatever they wanted with women." L.T. further averred that H.C. "said that where he used to patrol, nine times out of ten Mexican men were guilty of being aggressive toward women and young girls." Finally, L.T. stated that H.C. "said

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[3] Petitioner's friend, M. Chavez, testified that Petitioner was with him at the time of the incident and thus could not have been the man in the bathroom.

that he did not think the alibi witness was credible because, among other things, he was 'an illegal.'" Based on these affidavits, Petitioner moved for a new trial. The trial court denied the motion, finding that CRE 606(b) barred any inquiry into H.C.'s alleged bias during deliberations.[4]

Petitioner appealed, and a split division of the court of appeals affirmed. *Pena-Rodriguez*, ¶3. The majority first held that CRE 606(b) controlled the admissibility of the jurors' affidavits and that the affidavits did not satisfy the rule's exceptions. *Id.* at ¶¶ 33, 38, 41-42. The

The majority then rejected Petitioner's constitutional challenge regarding his Sixth Amendment right to an impartial jury, holding that Petitioner "waived his ability to challenge the verdict on this basis by failing to sufficiently question jurors about racial bias in voir dire." *Id.* at ¶43. Writing in dissent, Judge Taubman did not disagree with the majority's general analysis of CRE 606(b). *Id.* at ¶107 n.3. He concluded, however, that CRE 606(b) was unconstitutional as applied. *Id.* at ¶ 107. We granted certiorari.

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[4] The trial court did conduct a brief hearing to investigate whether H.C. deliberately misrepresented his experience in law enforcement during voir dire; it found his failure to disclose this information to be inadvertent. This issue is irrelevant to this appeal.

II. Standard of Review

The general applicability of CRE 606(b) is a question of law that we review de novo. *See Kendrick v. Pippin*, 252 P.3d 1052, 1064 (Colo. 2011), *abrogated on other grounds by Bedor v. Johnson*, 2013 CO 4, 292 P.3d 924. But whether the jury was influenced by extraneous prejudicial information is a mixed question of law and fact; we accept the trial court's findings of fact absent an abuse of discretion, but we review the court's legal conclusions de novo. *Id.*

III. Analysis

This case requires us to resolve whether CRE 606(b) bars admission of juror affidavits suggesting that a juror made racially biased statements during deliberations. To do so, we first examine the plain language of the rule and its overarching purpose. We then conclude that such affidavits indeed implicate CRE 606(b) and do not fall within the rule's "extraneous prejudicial information" exception. Finally, we consider whether the rule was unconstitutional as applied to Petitioner, and we determine that enforcing the rule did not violate his Sixth Amendment right to an impartial jury.

A. CRE 606(b): Language and Purpose

CRE 606(b)is broad in scope: It precludes courts from peering beyond the veil that shrouds jury deliberations. Specifically, the rule provides as follows:

> Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the

> effect of anything upon his or any other juror's mind or emotions as influencing him to assent to or dissent from the verdict or indictment or concerning his mental processes in connection therewith.

CRE 606(b). The rule does, however, enumerate three narrow exceptions: "[A] juror may testify about (1) whether extraneous prejudicial information was improperly brought to the jurors' attention, (2) whether any outside influence was improperly brought to bear upon any juror, or (3) whether there was a mistake in entering the verdict onto the verdict form." *Id.* Colorado's rule is virtually identical to its federal counterpart. *Compare id. with* Fed. R. Evid. 606(b). *See also* CRE 606(b) committee cmt. ("[CRE] 606(b) has been amended to bring it into conformity with the 2006 amendments to the federal rule. .").

CRE 606(b) effectuates three fundamental purposes: It "promote[s]finality of verdicts, shield[s]verdicts from impeachment, and protect[s] jurors from harassment and coercion." *People v. Harlan*, 109 P.3d 616, 624 (Colo. 2005). Thus, the rule "strongly disfavors any juror testimony impeaching a verdict." *Id.* We have recognized that the federal rule is equally forbidding. *See Stewart ex rel. Stewart v. Rice*, 47 P.3d 316, 321 (Colo. 2002) ("[Fed. R. Evid. 606(b)] would have been hard to paint with a broader brush, and in terms of subject, [its] exclusionary principle reaches everything which relates to the jury's deliberations, unless one of the exceptions applies." (quoting Christopher B. Mueller, *Jurors' Impeachment of Verdicts and Indictments in Federal Court Under Rule 606(b)*, 57 Neb. L. Rev. 920, 935 (1978))).

With the proscriptive language and purpose of CRE 606(b) in mind, we now consider whether the rule operates to bar admission of the juror affidavits in this case.

B. CRE 606(b) Bars Admission of the Jurors' Affidavits

CRE 606(b)'s plain language clearly bars admission of the jurors' affidavits in this case. Absent narrow exceptions, the rule unambiguously prohibits juror testimony "as to any matter or statement occurring during the course of the jury's deliberations." Here, Petitioner seeks to introduce juror testimony precisely to that effect, as the affidavits from both M.M. and L.T. pertain to statements made during deliberations. Therefore, CRE 606(b) precludes their admission.

Petitioner argues that the affidavits do not involve "an inquiry into the validity of [the]verdict" as contemplated by CRE 606(b). In Petitioner's view, the rule only applies to statements regarding the jury's actual deliberative process – that is, *how* the jury reached its verdict – and not to evidence of a particular juror's racial bias. To the extent that we can even parse this semantic distinction, we deem it immaterial. Petitioner seeks to introduce evidence of comments made during deliberations in order to nullify the verdict and obtain a new trial. Such a request necessarily involves an inquiry into the verdict's validity, which is the very inquiry that CRE 606(b) prevents.

Indeed, the U.S. Supreme Court expressly rejected this exact argument in *Warger v. Shauers*, 135 S. Ct. 521, 528 (2014), determining that the rule "does not

focus on the means by which deliberations evidence might be used to invalidate a verdict." Rather, the Court held that the rule "simply applies '[d]uring an inquiry into the validity of the verdict' – that is, during a *proceeding* in which the verdict may be rendered invalid." *Id.* (alteration in original). Although the Court was interpreting Fed. R. Evid. 606(b), we have previously recognized that CRE 606(b) is "[s]ubstantially similar to its federal counterpart" and that we "look to the federal authority for guidance in construing our rule." *Stewart*, 47 P.3d at 321. Thus, *Warger* forecloses Petitioner's argument.

Petitioner next contends that, even if CRE 606(b)applies, the affidavits satisfy the rule's exception for "extraneous prejudicial information." He is mistaken. That exception pertains to "legal content and specific factual information learned from outside the record and relevant to the issues in a case." *Kendrick*, 252 P.3d at 1064; *see, e.g.*, *Harlan*, 109 P.3d at 629 (holding that two jurors' introductions of annotated Bibles into deliberations during a death penalty case constituted extraneous information because "[t]he trial court had not admitted these materials into evidence, nor did the court's instructions allow their use"). But it is "generally undisputed" that jurors "may apply their general knowledge and everyday experience when deciding cases." Kendrick, 252 P.3d at 1064; *accord Warger*, 135 S. Ct. at 529 ("Generally speaking, information is deemed 'extraneous' if it derives from a source 'external' to the jury. 'External' matters include publicity and information related specifically to the case the jurors are meant to decide, while 'internal' matters include the general body of experiences that

jurors are understood to bring with them to the jury room."). Here, H.C. did not perform any improper investigation into Petitioner's case, nor did he introduce evidence from outside the record into the jury room. Rather, his alleged racial bias arose from his personal beliefs and everyday experience. Such bias, however ideologically loathsome, is not "extraneous" as contemplated by CRE 606(b).

And once again, *Warger* scuttles Petitioner's claim. In that car-crash case, following a verdict for the defendant, a juror reported that another juror stated during deliberations that her daughter had once caused a motor vehicle accident and that "if her daughter had been sued, it would have ruined her life." 135 S. Ct. at 524. The Court held that such information "falls on the 'internal' side of the line: [The juror's] daughter's accident may well have informed her general views about negligence liability for car crashes, but it did not provide either her or the rest of the jury with any specific knowledge regarding [the] collision." *Id.* at 529. The Court noted that even if the juror's comments would have warranted a challenge for cause, that did not render them "extraneous," as otherwise "[t]he 'extraneous' information exception would swallow much of the rest of Rule 606(b)." *Id.* at 530. The same analysis applies here.

Accordingly, we hold that the affidavits concerning H.C.'s biased statements fall within the broad sweep of CRE 606(b) and that they do not satisfy the rule's "extraneous prejudicial information" exception. We

now address whether CRE 606(b)was unconstitutional as applied in this case.[5]

C. CRE 606(b) Was Not Unconstitutional as Applied

The Sixth Amendment to the U.S. Constitution provides that "the accused shall enjoy the right to . an impartial jury." The question here is whether the trial court's application of CRE 606(b), which functioned to bar evidence of H.C.'s alleged racial bias against Petitioner, violated his Sixth Amendment right.

The U.S. Supreme Court addressed a similar – though not identical – issue in *Tanner v. United States*, 483 U.S. 107 (1987). In that case, following the verdict, a juror contacted defense counsel and informed him that several jurors had consumed alcohol on lunch breaks during the trial and had slept

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[5] The court of appeals refused to conduct this analysis, holding that Petitioner "waived his ability to challenge the verdict on this basis by failing to sufficiently question jurors about racial bias in voir dire." *Pena-Rodriguez*, ¶43. But a defense attorney's decision not to ask about racial bias – and to instead attempt to root out prejudice through generalized questioning – is entirely defensible as a matter of strategy. *See United States v. Villar*, 586 F.3d 76, 87 n.5 (1st Cir. 2009) ("[M]any defense attorneys have sound tactical reasons for not proposing specific voir dire questions regarding racial or ethnic bias because it might be viewed as insulting to jurors or as raising an issue defense counsel does not want to highlight."). Here, Petitioner's counsel asked potential jurors not whether they took issue with Petitioner's race but simply if they could be fair. We cannot conclude that this tactical decision to avoid explicitly inquiring about racial bias – which would have underscored Petitioner's minority background – constituted an affirmative waiver of Petitioner's constitutional right to an impartial jury.

through afternoons, while another juror told counsel that the jury was "one big party" and that numerous jurors used alcohol and drugs. *Id.* at 113, 115-16. After holding that Fed. R. Evid. 606(b) barred this testimony, *see id.* at 125, the Court considered whether the Sixth Amendment nevertheless required the trial court to examine such evidence. The Court first declared that "long-recognized and very substantial concerns support the protection of jury deliberations from intrusive inquiry." *Id.* at 127. Turning to the opposing scale, the Court reasoned that "several aspects of the trial process" protect a defendant's Sixth Amendment right to an impartial jury. *Id.* The Court identified four specific safeguards: (1) voir dire; (2) the court and counsel's ability to observe the jury during trial; (3) jurors' opportunity to "report inappropriate juror behavior to the court before they render a verdict"; and (4) the opportunity to use non-juror evidence of misconduct to impeach the verdict following trial. *Id.* The Court thus concluded that Rule 606(b) need not yield to Sixth Amendment considerations. *See id.*

Tanner, then, held that Rule 606(b) was not unconstitutional as applied to cases of juror incompetence. Last year, the Court in *Warger* extended *Tanner* to cases of juror bias. Relying on *Tanner*, the Court recognized that "[e]ven if jurors lie in voir dire in a way that conceals bias, juror impartiality is adequately assured by the parties' ability to bring to the court's attention any evidence of bias before the verdict is rendered, and to employ nonjuror evidence even after the verdict is rendered." *Warger*, 135 S. Ct. at 529. Therefore, the Court held

that *Tanner* foreclosed "any claim that Rule 606(b) is unconstitutional in circumstances such as these." *Id.*

Combined, *Tanner* and *Warger* stand for a simple but crucial principle: Protecting the secrecy of jury deliberations is of paramount importance in our justice system. *See Tanner*, 483 U.S. at 119 ("Substantial policy considerations support the common-law rule against the admission of jury testimony to impeach a verdict."); *Warger*, 135 S. Ct. at 528 ("Rule 606(b) was premised on the concerns that the use of deliberations evidence to challenge verdicts would represent a threat to both jurors and finality in those circumstances not covered by the Rule's express exceptions."). It was this principle that animated the Court's refusals to deem Rule 606(b) unconstitutional, despite concerns regarding juror impropriety. Indeed, although the *Tanner* Court acknowledged that "postverdict investigation into juror misconduct would in some instances lead to the invalidation of verdicts reached after irresponsible or improper juror behavior," it warned that "[i]t is not at all clear . . . that the jury system could survive such efforts to perfect it." 483 U.S. at 120. As the Court recognized, not only would authorizing post-verdict investigations of jurors "seriously disrupt the finality of the process," but the very potential for such investigations would shatter public confidence in the fundamental notion of trial by jury. *Id.* ("[F]ull and frank discussion in the jury room, jurors' willingness to return an unpopular verdict, and the community's trust in a system that relies on the decisions of laypeople would all be undermined by a barrage of postverdict scrutiny of juror conduct."); *see also United States v. Benally*, 546 F.3d 1230, 1233 (10th Cir. 2008) ("If what went on in

the jury room were judicially reviewable for reasonableness or fairness, trials would no longer truly be by jury, as the Constitution commands."). In fact, the Court perceived such a slippery slope as far back as 100 years ago:

> [L]et it once be established that verdicts solemnly made and publicly returned into court can be attacked and set aside on the testimony of those who took part in their publication and all verdicts could be, and many would be, followed by an inquiry in the hope of discovering something which might invalidate the finding. Jurors would be harassed and beset by the defeated party in an effort to secure from them evidence of facts which might establish misconduct sufficient to set aside a verdict. If evidence thus secured could be thus used, the result would be to make what was intended to be a private deliberation, the constant subject of public investigation; to the destruction of all frankness and freedom of discussion and conference.

McDonald v. Pless, 238 U.S. 264, 267-68 (1915).

Turning to the instant case, this case law compels the conclusion that CRE 606(b) was not unconstitutional as applied to Petitioner. A contrary holding would ignore both the policy underlying CRE 606(b) and the unwavering Supreme Court precedent emphasizing the magnitude of that policy. To be sure, neither *Tanner* nor *Warger* involved the exact issue of racial bias. But in examining the Court's jurisprudence, we cannot discern a dividing line between different *types* of juror bias or misconduct,

whereby one form of partiality would implicate a party's Sixth Amendment right while another would not. *Cf. Benally*, 546 F.3d at 1241 ("[O]nce it is held that the rules of evidence must be subordinated to the need to admit evidence of Sixth Amendment violations, we do not see how the courts could stop at the 'most serious' such violations."). To draw such a line would not only violate the longstanding rule of shielding private jury deliberations from public view – not to mention incentivize post-verdict harassment of jurors – but it would also require trial courts to make arbitrary judgments that hinge on the severity of a particular juror's impropriety or the intensity of his bias. We decline to sanction such a haphazard process.

Admittedly, bias is less readily visible than intoxication, meaning the second *Tanner* protection – the ability of the court to observe the jury's behavior during trial – carries less force in such cases. But that did not prevent the *Warger* Court from deeming the remaining *Tanner* safeguards sufficient to protect a party's constitutional rights, even when a biased juror lied during voir dire. See *Warger*, 135 S. Ct. at 529; *see also Benally*, 546 F.3d at 1240 ("The safeguards that the Court relied upon for exposing the drug and alcohol use amongst jurors in *Tanner* are also available to expose racial biases. . . ." (emphasis added)). The same is true here. Other jurors could have informed the court or counsel of H.C.'s statements prior to delivering the verdict, and any non-juror evidence of his bias remained admissible post-verdict. That these safeguards did not benefit Petitioner in this case does not nullify their validity, nor *Warger*'s clear endorsement of their ability to

protect a party's constitutional right to an impartial jury.[6]

Accordingly, we conclude that the trial court's application of CRE 606(b) to bar admission of the jurors' affidavits did not violate Petitioner's Sixth Amendment right.

IV. Conclusion

CRE 606(b) operates to ensure that the privacy of jury deliberations remains sacrosanct. The rule, and the policy it buttresses, is squarely on point in this case. We thus hold that the jurors' affidavits regarding H.C.'s biased statements fall within the broad sweep of CRE 606(b) and that they do not satisfy the rule's "extraneous prejudicial information" exception. We further hold that the trial court's application of CRE 606(b) did not violate Petitioner's Sixth Amendment right to an impartial jury. Accordingly, we affirm the judgment of the court of appeals.

JUSTICE MÁRQUEZ dissents, and JUSTICE EID and JUSTICE HOOD join in the dissent.

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[6] We recognize that the *Warger* Court commented, in a footnote, that "[t]here may be cases of juror bias so extreme that, almost by definition, the jury trial right has been abridged." 135 S. Ct. at 529 n.3. But the Court declined to consider in that case "whether the usual safeguards are or are not sufficient to protect the integrity of the process." *Id.* Absent a clear command from the Supreme Court, we will not defy the unmistakable trend in the Court's case law – as articulated in both *Tanner* and *Warger* – preserving the sanctity of jury deliberations and thus refusing to deem Rule 606(b) unconstitutional.

JUSTICE MÁRQUEZ, dissenting:

I agree with the majority that CRE 606(b) bars admission of the post-verdict affidavits in this case. By its terms, that rule of evidence precludes any "inquiry into the validity of a verdict" based on juror testimony regarding statements made during jury deliberations, and Pena-Rodriguez's motion for a new trial "plainly entail[ed] an inquiry into the validity of the verdict," even if it questioned the jury's impartiality and not its thought processes. *Warger v. Shauers*, 135 S. Ct. 521, 525 (2014) (internal quotation marks omitted). I also agree that evidence of a juror's personal bias does not qualify as "extraneous prejudicial information" for purposes of the exception in CRE 606(b)(1). *See id.*at 529; *United States v. Benally*, 546 F.3d 1230, 1237–38 (10th Cir. 2008); *Kendrick v. Pippin*, 252 P.3d 1052, 1064 (Colo. 2011). Nevertheless, I respectfully dissent because, in my view, Rule 606(b) "cannot be applied so inflexibly as to bar juror testimony in those rare and grave cases where claims of racial or ethnic bias during jury deliberations implicate a defendant's right to due process and an impartial jury." *United States v. Villar*, 586 F.3d 76, 87 (1st Cir. 2009). Racial bias is detestable in any context, but in our criminal justice system it is especially pernicious. *See Rose v. Mitchell*, 443 U.S. 545, 555 (1979). I would hold that where, as here, evidence comes to light that a juror specifically relied on racial bias to find the defendant guilty, CRE 606(b) must yield to the defendant's constitutional right to an impartial jury.[1]

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[1] I note that the question before us is not whether there is sufficient evidence to impeach the jury's verdict. Rather, the question is simply whether the trial court has discretion to

By foreclosing consideration of the evidence of racial bias alleged in this case, the majority elevates general policy interests in the finality of verdicts and in avoiding the potential embarrassment of a juror over the defendant's fundamental constitutional right to a fair trial. Although the majority believes that this result is required to preserve public confidence in our jury trial system, in my view, it has precisely the opposite effect.

"The right to an impartial jury is guaranteed by both the Sixth Amendment, made applicable to the States through the Fourteenth Amendment, and by principles of due process." *Turner v. Murray*, 476 U.S. 28, 36 n.9 (1986). Our state constitution likewise guarantees this right. *See* Colo. Const. art. II, §§ 16, 25. Indeed, this court has observed that "[a]n impartial jury is a fundamental element of the constitutional right to a fair trial." *Morrison v. People*, 19 P.3d 668, 672 (Colo. 2000) (citing *People v. Rhodus*, 870 P.2d 470, 473 (Colo. 1994)). Racial discrimination in our jury trial system "not only violates our Constitution and the laws enacted under it but is at war with our basic concepts of a democratic society and a representative government." *Smith v. Texas*, 311 U.S. 128, 130 (1940) (footnote omitted). Importantly, the harm caused by such discrimination is "'not limited to the defendant – there is injury to the jury system, to the law as an institution, to the community at large, and to the democratic ideal reflected in the processes

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consider the allegations made in the post-verdict affidavits and to explore the validity of those allegations in an evidentiary hearing as part of a motion for a new trial.

of our courts.'" *Rose*, 443 U.S. at 556 (quoting *Ballard v. United States*, 329 U.S. 187, 195 (1946)).

In its recent discussion of Fed. R. Evid. 606(b) in *Warger*, the United States Supreme Court observed that certain features built into the jury system ordinarily suffice to expose juror bias before the jury renders a verdict. *Warger*, 135 S. Ct. at 529 (citing Tanner v. United States, 483 U.S. 107, 127 (1987)).[2] *Warger* involved a negligence action arising out of a motor vehicle accident. *See id.*at 524. In that case, a juror allegedly stated during deliberations that her daughter had been at fault in a motor vehicle collision in which a man died and that if her daughter had been sued, it would have ruined her life. *Id.* Warger argued in a motion for a new trial that this statement revealed that the juror had lied during voir dire about her impartiality and her ability to award damages. *Id.* The Court concluded that Fed. R. Evid. 606(b) barred consideration of this evidence. *Id.* at 525. It also concluded that its decision in *Tanner* foreclosed Warger's claim that Rule 606(b) was unconstitutional as applied to the circumstances of that case. *Id.* at 529. In so doing, however, the Court expressly acknowledged that "[t]here may be cases of juror bias so extreme that, almost by definition, the jury trial right has been abridged," and declined to consider whether "the usual safeguards are or are not sufficient to protect the integrity of the [jury] process" under

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[2] These protections include: (1) voir dire; (2) observations of the jury by the court, counsel, and court personnel during trial; (3) pre-verdict reports by jurors of inappropriate behavior; and (4) post-verdict evidence other than juror testimony. *Tanner*, 483 U.S. at 127.

such circumstances. *Id.* at 529 n.3. In my view, this is that exceptional case.

According to the two juror affidavits obtained by Pena-Rodriguez's counsel, Juror H.C. made several statements during jury deliberations indicating that he relied on racial bias to determine Pena-Rodriguez's guilt:

- Pena-Rodriguez "did it because he's Mexican and Mexican men take whatever they want."
- Mexican men are physically controlling of women because they have a sense of entitlement and think they can "do whatever they want" with women.
- Pena-Rodriguez "was guilty because, in [Juror H.C.'s] experience as an ex-law enforcement officer, Mexican men had a bravado that caused them to believe they could do whatever they wanted with women."
- Where Juror H.C. used to patrol, "nine times out of ten Mexican men were guilty of being aggressive toward women and young girls."
- Pena-Rodriguez's alibi witness was not credible because, among other things, he was "an illegal."

In my view, the circumstances of this case reveal that the safeguards identified in *Tanner* are not always adequate to protect a criminal defendant's constitutional right to an impartial jury. Unlike the comment in *Warger*, Juror H.C.'s multiple statements in this case evince racial bias toward a criminal defendant. And, importantly, these alleged statements

reveal Juror H.C.'s inability to decide impartially the crucial issue in this case: whether Pena-Rodriguez committed the charged crimes, or whether he instead had a credible alibi.

The majority claims to adhere to "the unmistakable trend" in United States Supreme Court case law "refusing to deem Rule 606(b) unconstitutional." Maj. op. ¶ 24 n.6. Yet the Supreme Court has expressly acknowledged the possibility that juror bias may be so "extreme" as to call into question the adequacy of the usual safeguards to protect the integrity of the process. *Warger*, 135 S. Ct. at 529 n.3. In my view, where, as here, it appears that a juror specifically relied on racial bias to find the defendant guilty, Rule 606(b) must yield to a defendant's constitutional right to an impartial jury, in that a trial court must be afforded the discretion to explore the validity of such allegations in the context of a motion for a new trial.

The question whether evidence of a juror's racial bias should be admissible in some cases, notwithstanding Rule 606(b), is hardly uncharted territory. In *Villar*, the United States Court of Appeals for the First Circuit considered whether the usual *Tanner* safeguards suffice to protect a defendant's right to an impartial jury where racial or ethnic bias is alleged, as opposed to the type of juror misconduct at issue in *Tanner*. 586 F.3d at 85-87. In *Villar*, a juror emailed defense counsel following the verdict to report that another juror said, "I guess we're profiling, but [Hispanics] cause all the trouble." *Id.* at 81 (internal quotation marks omitted). Similarly, in *Kittle v. United States*, 65 A.3d 1144, 1147-48 (D.C. 2013), a

juror wrote to the judge post-verdict alleging that some jurors felt that "all 'blacks' are guilty." Like the present case, both *Villar* and *Kittle* involved racially motivated statements directly tied to the defendant's guilt.

In *Villar*, the First Circuit concluded that "the four protections relied on by the *Tanner* Court do not provide adequate safeguards in the context of racially and ethnically biased comments made during deliberations." 586 F.3d at 87; *see also Kittle*, 65 A.3d at 1154 ("[T]he protections built into the trial process identified by *Tanner* do not adequately protect a defendant's constitutional right to a trial and jury free from racial or ethnic bias."). Although the *Tanner* safeguards serve to protect a defendant's Sixth Amendment right to a jury trial, they focus on juror *misconduct*. *See* 483 U.S. at 127.[3] In my view, they are not always adequate to uncover racial bias before the jury renders its verdict.

First, as the majority acknowledges, defense attorneys may, for legitimate tactical reasons, choose not to question jurors about racial bias during voir dire and instead attempt to root out prejudice through more generalized questioning. Maj. op. ¶ 18 n.5; *see also Villar*, 586 F.3d at 87 n.5; *Kittle*, 65 A.3d at 1155. And even when defense attorneys are willing to probe this sensitive topic directly, jurors may be reluctant to admit racial bias during voir dire. *Villar*, 586 F.3d at

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[3] In *Tanner*, a juror alleged in an interview following the trial that he "felt like the jury was on one big party"; that multiple jurors consumed large quantities of alcohol during recesses, smoked marijuana, and ingested cocaine; and that some jurors fell asleep or were high during trial. 483 U.S. at 115-16.

87. Second, jurors might not report racial comments made during deliberations before the verdict because they are unwilling to confront their fellow jurors, or because they believe they cannot report such comments before rendering a verdict, or because they are unaware that post-verdict testimony is putatively inadmissible. *Kittle*, 65 A.3d at 1155; *see also People v. Pena-Rodriguez*, 2012 COA 193, ¶ 120, __ P.3d __ (Taubman, J., dissenting) (noting that the trial court instructed the jury that it would not be able to communicate with anyone during deliberations). *Contra* maj. op. ¶ 24. Third, observations of the jury by counsel and the court during trial are generally unlikely to uncover racial bias. *Villar*, 586 F.3d at 87; *see* maj. op. ¶ 24. And fourth, non-jurors cannot report racially biased statements made during deliberations to which they obviously do not have access. *Villar*, 586 F.3d at 87. *Contra* maj. op. ¶24. For all these reasons, the *Tanner* protections do not always provide adequate safeguards of a defendant's right to an impartial jury.[4]

In my view, the trial court should have discretion in some circumstances to admit evidence of racially biased statements made during juror deliberations. As the *Villar* court noted, the trial judge will often be in the best position to determine whether an inquiry is necessary to vindicate a defendant's Sixth Amendment

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[4] In *Kittle*, the court noted a split among federal courts of appeals on the question whether evidence of racial or ethnic bias should be admissible and concluded that *Villar* was more persuasive than conflicting decisions. *See* 65 A.3d at 1153-54 & n.9 (comparing *Villar*, 586 F.3d at 85-87, *United States v. Henley*, 238 F.3d 1111, 1120 (9th Cir. 2001), and *Shillcutt v. Gagnon*, 827 F.2d 1155, 1159 (7th Cir. 1987), *with Benally*, 546 F.3d at 1237, and *Williams v. Price*, 343 F.3d 223, 225-35 (3d Cir. 2003)).

right to an impartial jury. *See* 586 F.3d at 88; *see also Kittle*, 65 A.3d at 1155-56. Thus, the *Villar* court remanded that case to the trial court to decide whether the juror's report warranted further inquiry. 586 F.3d at 89.[5]

Should the trial court conclude that further inquiry is appropriate, it must then determine whether a juror was actually biased. If such a juror sat on the case, the defendant is entitled to a new trial without having to establish that the juror's bias affected the verdict. See *Commonwealth v. McCowen*, 939 N.E.2d 735, 765 (Mass. 2010) ("Because actual juror bias affects the essential fairness of the trial, a defendant who has established a juror's actual bias is entitled to a new trial without needing to show that the juror's bias affected the jury's verdict."); *cf. People v. Dunoyair*, 660 P.2d 890, 895-96 (Colo. 1983) (implying that a defendant is presumptively prejudiced and entitled to a new trial if he or she establishes that a juror was actually biased). Only if the defendant fails to establish that a juror was actually biased must he show that the "statements so infected the deliberative process with racially or ethnically charged language or stereotypes that it prejudiced the defendant's right to have his guilt decided by an impartial jury on the evidence admitted at trial." *McCowen*, 939 N.E.2d at 765. Therefore, contrary to the People's argument, Pena-Rodriguez

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[5] On remand, the trial court ultimately determined that the jury's verdict should stand, and that decision was upheld on appeal. *See United States v. Villar*, 411 F.App'x 342, 342 (1st Cir. 2011) (per curiam), *cert. denied*, 131 S. Ct. 2167 (2011).

may be entitled to a new trial regardless of the effect of Juror H.C.'s comments on the verdict.

The majority admits that *Tanner* did not implicate "the exact issue of racial bias" but summarily concludes: "[W]e cannot discern a dividing line between different types of juror bias or misconduct." Maj. op. ¶ 23. I disagree. I would limit our holding in this case to post-verdict evidence of racial or ethnic bias that goes directly to the issue of the defendant's guilt. Racial bias differs from other forms of bias in that it compromises institutional legitimacy. *See* Ashok Chandran, *Color in the "Black Box": Addressing Racism in Juror Deliberations*, 5 Colum. J. Race & L. 28, 44-45, 47 (2015). A holding limited to such circumstances would reflect and respond to a real-world threat to the integrity of the jury trial right. *See Warger*, 135 S. Ct. at 529 n.3.

Furthermore, the majority overstates its concerns about the potential demise of the jury system should the allegations in this case be admissible in a motion for a new trial. The majority reasons that "the secrecy of jury deliberations is of paramount importance in our justice system," maj. op. ¶ 22, yet fails to acknowledge that jurors are free to discuss deliberations publicly. *See* Amanda R. Wolin, *What Happens in the Jury Room Stays in the Jury Room . . . But Should It?: A Conflict Between the Sixth Amendment and Federal Rule of Evidence 606(b)*, 60 UCLA L. Rev. 262, 294-95 (2012). Concerns about "post-verdict harassment of jurors," maj. op. ¶ 23, are similarly misplaced: Even commentators critical of allowing post-verdict evidence of juror bias have observed that the exception in Rule 606(b)(1) for extraneous information already creates

an incentive for the losing party to contact jurors after a verdict has been rendered. *See* Lee Goldman, *Post-Verdict Challenges to Racial Comments Made During Juror Deliberations*, 61 Syracuse L. Rev. 1, 9-10 (2010). The majority's broader fear that the jury system may not survive absent unbending application of Rule 606(b), maj. op. ¶ 22,[6] has proven groundless; the jury system has not collapsed in jurisdictions where trial courts have discretion, in rare circumstances, to allow post-verdict evidence of racial bias. *Cf. Pena-Rodriguez*, ¶ 123 (Taubman, J., dissenting) (observing that post-verdict evidence of racial bias has rarely surfaced in Colorado; thus, any exception to CRE 606(b) would be invoked only infrequently).

The policies of finality and juror privacy that underlie CRE 606(b) are well founded. Moreover, not every stray comment reflecting a racial stereotype warrants a hearing. However, this case presents the extreme exception contemplated in *Warger*. The multiple comments alleged to have been made in this case were heard by other jurors and were directly tied to the determination of the defendant's guilt. According to the two post-verdict affidavits, Juror H.C. expressed in various ways that Pena-Rodriguez "did it

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[6] The majority quotes *McDonald v. Pless*, 238 U.S. 264, 267-68 (1915), for the proposition that permitting post-verdict evidence of impropriety during deliberations would undermine the jury system. Maj. op. ¶ 22. Yet the Supreme Court recognized in that case that "it would not be safe to lay down any inflexible rule because there might be instances in which such testimony of the juror could not be excluded without violating the plainest principles of justice." *McDonald*, 238 U.S. at 268-69 (internal quotation marks omitted).

because he's Mexican." I simply cannot agree with the majority that "[p]rotecting the secrecy of jury deliberations" is of such "paramount importance in our justice system," maj. op. ¶ 22, that it must trump a defendant's opportunity to vindicate his fundamental constitutional right to an impartial jury untainted by the influence of racial bias. In my view, to foreclose consideration of the allegations presented here is precisely what "shatter[s] public confidence in the fundamental notion of trial by jury." *Id.* Accordingly, I respectfully dissent.

I am authorized to state that JUSTICE EID and JUSTICE HOOD join in this dissent.

APPENDIX B

COLORADO COURT OF APPEALS

2012 COA 193

Court of Appeals No. 11CA0034
Arapahoe County District Court No. 07CR2311
Honorable John L. Wheeler, Judge

The People of the State of Colorado,

Plaintiff-Appellee,

v.

Miguel Angel Pena-Rodriguez,

Defendant-Appellant.

JUDGMENT AFFIRMED
Division I
Opinion by JUDGE WEBB
Loeb, J., concurs
Taubman, J., dissents
Announced November 8, 2012

John W. Suthers, Attorney General, Majid Yazdi, Assistant Attorney General, Denver, Colorado, for Plaintiff-Appellee

The Law Office of Jonathan D. Rosen, PC, Jonathan D. Rosen, Denver, Colorado, for Defendant-Appellant

Secrecy of jury deliberations and juries free of bias are both core values of our jury system. But where a defendant seeks to prove that a juror exhibited racial bias during deliberations, these values conflict. Resolving this conflict is a matter of first impression in Colorado.

A jury convicted defendant, Miguel Angel Pena-Rodriguez, of unlawful sexual contact and harassment. He now challenges the judgment of conviction, contending the trial court committed multiple errors involving the jury. Defendant's primary contention concerns one juror's alleged failure to disclose racial bias, constituting juror misconduct.

We conclude that CRE 606(b) renders juror affidavits describing statements of racial bias made during deliberations inadmissible, and we decline to hold CRE 606(b) unconstitutional as so applied because defendant failed to conduct specific voir dire on racial bias. Rejecting defendant's other contentions, we affirm.

I. Background

Defendant was charged with attempted sexual assault on a child, unlawful sexual contact, and harassment based on his contact with two teenage girls. During voir dire, the trial court and counsel questioned the venire on several topics, including, as relevant here, whether any of the potential jurors:

- Had "any feeling for or against" either party;
- "Are in law enforcement or had family or close friends in law enforcement;

- Could not "render a verdict solely on the evidence presented at trial and the law," without regard to "any other ideas, notions, or beliefs about the law"
- Had taken "law classes of any kind";
- Thought this would not be a "good case" for them to serve as "a fair juror";
- Wanted to discuss "anything else" privately with the court.

Defendant's assertion of misconduct involves H.C., whose only response to these questions was that he had taken classes in real estate and contract law. He agreed to put aside this knowledge when rendering his verdict and was sworn in as Juror 11.

The prosecution relied on pretrial and in-court identification of defendant by the victims, but presented no physical evidence. Defendant's sole witness testified to having been with defendant at a different location when the charged offenses occurred. The jury convicted defendant of unlawful sexual contact and harassment but could not reach a verdict on the sexual assault charge.

After the jury returned its verdict and was dismissed, two jurors told defense counsel that a juror – later identified as Juror 11 – had made racially biased statements during deliberations. Defendant moved for access to all of the jurors' contact information. Despite receiving affidavits from defense counsel stating the "who, what, when, and where" of the allegation, as the trial court had requested, the

court refused to grant "carte blanche" access to jurors. Instead, it ordered:

- Defendant would specify the gender of the jurors who made the allegations;
- The trial court would then permit defense counsel to contact jurors of that gender, provided that the contact was limited to identifying the two jurors who made the allegations;
- Defense counsel could then secure affidavits from the two jurors addressing only what statements the allegedly biased juror had made concerning his bias.

Without objection, defendant complied with this procedure, which resulted in two juror affidavits.

The first affidavit quoted Juror 11 as having said that he thought defendant "did it because he's Mexican and Mexican men take whatever they want." This affidavit referenced unspecified "other statements" made by Juror 11 about "Mexican men being physically controlling of women because they have a sense of entitlement and think they can 'do whatever they want' with women."

Similarly, the second affidavit indicated that Juror 11 had said that he "believed that the defendant was guilty because in his experience as an ex-law enforcement officer, Mexican men had a bravado that caused them to believe they could do whatever they wanted with women." The affidavit also averred that Juror 11 had said that "where he used to patrol, nine times out of ten Mexican men were guilty of being aggressive toward women and young girls." According

to this affidavit, Juror 11 also said that he "did not think the alibi witness was credible because, among other things, he was 'an illegal.'"

The trial court agreed to hold an evidentiary hearing on whether Juror 11 had misrepresented information during voir dire. However, because the court determined that Juror 11 had not been asked about racial bias during voir dire, the hearing would be limited to Juror 11's law enforcement experience and why he had not responded when asked about such experience. Defendant objected that the scope of the hearing was too narrow, arguing that Juror 11 was asked about racial bias. The court overruled both objections.

During the evidentiary hearing, Juror 11 testified that a distant relative was a law enforcement officer and that he had friends in law enforcement. Juror 11 only had a vague recollection of being asked about his law enforcement background, and said that any question did not "pointedly ask[]" about past employment. He said that he did not intentionally misrepresent his past employment, but thought that his law enforcement experience "forty years ago" was irrelevant.

The trial court found that while Juror 11 had misrepresented his law enforcement background during voir dire, the misrepresentation was inadvertent. Defendant does not appeal this ruling. Finding that Juror 11's law enforcement experience was too remote to show actual bias against defendant, the trial court refused to grant a new trial.

II. Denial of Motion for New Trial

The record refutes defendant's contention that the trial court abused its discretion in finding that Juror 11 was not specifically asked about racial bias in voir dire. Thus, we conclude that the court properly limited the evidentiary hearing to Juror 11's law enforcement connections. Defendant has not appealed the trial court's finding that Juror 11 made no deliberate misrepresentations about those connections. And, because the record also supports the trial court's finding that Juror 11's law enforcement connections did not create actual bias, we further conclude that the court properly denied defendant's motion for new trial.

A. Standard of Review

Post-trial rulings involving alleged juror misconduct are reviewed for an abuse of discretion. *People v. Mollaun*, 194 P.3d 411, 416 (Colo. App. 2008). To abuse its discretion, a court's decision must be "manifestly arbitrary, unreasonable, or unfair, or based on an erroneous view of the law." *Id.* A court has not abused its discretion if the record provides some support for its action. *Cf. People v. Harlan*, 8 P.3d 448, 464 (Colo. 2000) (finding that, despite voir dire irregularities, because the record provided support for the trial court's rulings, the trial court did not abuse its discretion), *overruled on other grounds by People v. Miller*, 113 P.3d 743 (Colo. 2005).

B. Law

The United States and Colorado Constitutions guarantee criminal defendants a right to trial by an impartial jury. U.S. Const. amends. VI, XIV; Colo. Const. art. II, §§ 16, 25; *Dunlap v. People*, 173 P.3d

1054, 1081 (Colo. 2007). While voir dire is not a constitutional right, *People v. Reynolds*, 159 P.3d 684, 688 (Colo. App. 2006), Colorado court rules allow defendants to examine potential jurors for partiality. *See* Crim. P. 24(a). If a juror is asked a material question during voir dire and fails to answer that question truthfully, the court may grant a new trial. *People v. Borrelli*, 624 P.2d 900, 903 (Colo. App. 1980); *see People v. Rael*, 40 Colo. App. 374, 375-76, 578 P.2d 1067, 1068 (1978). However, to obtain a new trial based on juror misrepresentation, counsel must have asked specific questions about the subject of the misrepresentation during voir dire. *See Seventh Day Adventist Ass'n of Colorado v. Underwood*, 99 Colo. 139, 141-42, 60 P.2d 929, 930 (1936) (refusing to address in a motion for new trial the assertion that potentially biased jurors prevented a fair trial, as no "specific questions" were asked about this bias in voir dire).

Further, not all juror misrepresentations merit a new trial. *Allen v. Ramada Inn, Inc.*, 778 P.2d 291, 292 (Colo. App. 1989). If the misrepresentation was inadvertent, a defendant must show the juror's "actual bias" to obtain a new trial. *People v. Dunoyair*, 660 P.2d 890, 896 (Colo. 1983).

Actual bias requires more than an abstract belief in a defendant's guilt. *Beeman v. People*, 193 Colo. 337, 340, 565 P.2d 1340, 1342 (1977). Rather, the circumstances must show a "personal and emotional" connection between the juror and the defendant. *Id.* For example, in *Beeman v. People*, 193 Colo. at 339, 565 P.2d at 1341, a defendant in a rape case had previously frightened a juror's pregnant daughter. The

juror was so upset that she asked the defendant's employer to reprimand him. *Id.* Additionally, the weapon allegedly used in the rape was missing from the daughter's home. *Id.* at 339, 565 P.2d at 1341-42. Given all of these close connections, the court awarded a new trial. *Id.* at 338-39, 565 P.2d at 1341. Other examples of the close ties required to find actual bias include:

- A juror's husband, son, and father-in-law being police officers and the juror stating she would "end up" being biased. *People v. Prator*, 833 P.2d 819, 821 (Colo. App. 1992), *aff'd*, 856 P.2d 837 (Colo. 1993);
- A juror having a "close association with not only the law enforcement establishment, but also with this crime scene, and with the co-employee who had attended to this murder victim." *People v. Rogers*, 690 P.2d 886, 888 (Colo. App. 1984);
- A juror's husband being a police officer, the prosecution witness being "familiar" with her, and the prosecutor having been the juror's former teacher. *People v. Reddick*, 44 Colo. App. 278, 280, 610 P.2d 1359, 1360 (1980).

In contrast, juror ties such as the following were insufficient:

- A juror recognizing the victim as her daughter's acquaintance. *People v. Drake*, 841 P.2d 364, 367 (Colo. App. 1992);
- A juror realizing a witness testifying to "tangential" facts was a former acquaintance. *Dunoyair*, 660 P.2d at 895-96.

C. Application

1. Limiting the Hearing to Law Enforcement Connections

After reviewing the voir dire record,[1] the trial court ruled that Juror 11 had not been asked whether he harbored racial bias. The court recognized that Juror 11 was asked about feelings "for or against" defendant and whether this would be a good case to serve as a "fair juror." However, it concluded that these questions were not specific enough to find that Juror 11 had misrepresented information about his possible bias in voir dire. Observing that parties "almost always" pose specific questions about ethnicity during voir dire, the court noted that defense counsel's declining to do so may have been intentional.

The record contains some support for these conclusions. For example, before voir dire, the trial court told defense counsel that "in the past, some of our jurors have been vocal in their dislike of people who aren't in the country legally. I don't know if that's an issue for you or your client, but you may want to address it." Yet, during the extensive voir dire, defense counsel did not mention race, national origin, or immigration status. And unlike the questions about law enforcement, which several jurors answered broadly, no venire member responded when asked about having feelings "for or against the defendant."

Thus, we decline to disturb the finding that because Juror 11 was not asked about racial bias in

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[1] The judge who conducted defendant's trial and subsequent proceedings was different from the judge who conducted voir dire.

voir dire, defendant could not explore this subject at the hearing. Here, the trial court found that there "were no questions asked about the defendant's ethnicity" during voir dire. Based on this finding, the court impliedly concluded that Juror 11 could not have been expected to respond about any potential racial bias, the subject that defendant sought to explore in the hearing. This is a factual determination, distinct from our conclusion below that defendant waived his as-applied constitutional challenge to CRE 606(b), an issue we resolve de novo.

Although some of the questions asked might have elicited a response concerning racial bias, our review is limited to whether the record presents any basis for the trial court's decision. *See Harlan*, 8 P.3d at 462 ("In a noncapital case, we will overturn the trial court's resolution of a challenge for cause only if the record presents no basis for supporting it."). Here, the record presents such a basis. Therefore, the trial court did not abuse its discretion in limiting the evidentiary hearing to Juror 11's law enforcement connections.

2. "Actual Bias" Not Caused by Law Enforcement Connections

Defendant accepts the finding that Juror 11's misrepresentation of his law enforcement background was inadvertent, but contends that the trial court abused its discretion in finding no actual bias. However, defendant does not explain, nor does the record suggest, any such actual bias arising from Juror 11's limited law enforcement experience.

Juror 11's previous employment as an officer and general acquaintances with officers do not involve a personal relationship with any party or witness.

Further, his employment in law enforcement ended more than four decades before trial, making it highly improbable that such service would have overlapped with any party working on the case. Juror 11's relationships with present law enforcement personnel do not suggest bias because they are limited to some friends and a distant relative, none of whom has any connection to the case.

In addition, law enforcement witnesses played a relatively minor role in the case. *See Dunoyair*, 660 P.2d at 896 ("Such a presumption [of actual bias] would be particularly inappropriate where, as here, the witness's testimony relates to facts which are tangential to the alleged criminal act ."). At trial, the victims testified to the assault and their identification of defendant near the crime scene. They also identified defendant in the courtroom. Two close family members of the victims also testified to events immediately before and after the assault. Beyond describing the victims' crime scene identifications and investigation of other trial witnesses, the main role of the law enforcement witnesses was to describe having arrested defendant in the area shortly after the assaults were reported. They also defended having failed to gather fingerprint evidence at the scene.

Therefore, we conclude that the trial court did not abuse its discretion in denying defendant's motion for new trial.

III. Admissibility of Juror Affidavits Under CRE 606(b)

Defendant next contends that because the statements of bias attributed to Juror 11 in the juror affidavits showed deliberations were corrupted by

extraneous prejudicial information or an outside influence, he is entitled to a new trial. We reject this contention because we conclude that the statements do not fall within the exceptions to CRE 606(b), and thus the record contains no admissible evidence of Juror 11's bias.

A. Standard of Review

Interpretation of court rules is an application of law, requiring de novo review. *Gleason v. Judicial Watch, Inc.*, 2012 COA 76, ¶ 14. However, whether the jury was affected by extraneous influences or outside information is a mixed question of law and fact. *Kendrick v. Pippin*, 252 P.3d 1052, 1064 (Colo. 2011). We review legal conclusions de novo, while reviewing factual determinations for an abuse of discretion. *Id.*

B. Law

CRE 606(b)[2] broadly prevents attacks on verdicts using information from jury deliberations. Challenges to the "validity of a verdict" may not rely on:

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[2] "Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon his or any other juror's mind or emotions as influencing him to assent to or dissent from the verdict or indictment or concerning his mental processes in connection therewith. But a juror may testify about (1) whether extraneous prejudicial information was improperly brought to the jurors' attention, (2) whether any outside influence was improperly brought to bear upon any juror, or (3) whether there was a mistake in entering the verdict onto the verdict form. A juror's affidavit or evidence of any statement by the juror may not be received on a matter about which the juror would be precluded from testifying." CRE 606(b).

- Any issue or statement made during deliberations;
- The effect anything has on a juror's deliberations; or
- Any mental processes related to the jury's verdict.

This limitation protects the finality of verdicts and allows jurors to deliberate without fear of reprisal, coercion, or criticism. *See Stewart v. Rice*, 47 P.3d 316, 322 (Colo. 2002); *People v. Kriho*, 996 P.2d 158, 167 (Colo. App. 1999).

CRE 606(b) contains three exceptions. As relevant here, juror testimony is admissible to show that "extraneous prejudicial information" was brought to the jury's attention and that "outside influence" was brought to bear on a juror.

A defendant is entitled to a new trial if a reasonable possibility exists that the jury verdict was tainted by extraneous prejudicial information or outside influences. *Harper v. People*, 817 P.2d 77, 82 (Colo. 1991). However, evidence proving this prejudice is only admissible if it complies with CRE 606(b). *Ravin v. Gambrell*, 788 P.2d 817, 820 (Colo. 1990); *Wiser v. People*, 732 P.2d 1139, 1141 (Colo. 1987).

C. Application

1. "Validity of the Verdict"

Defendant first contends CRE 606(b) does not apply to statements made during deliberations when offered to show racial bias because the inquiry is not into the deliberative process. However, CRE 606(b) applies to evidence of statements made during

deliberations offered to attack "the validity of a verdict." Here, by seeking a new trial based on juror misconduct, defendant is attacking the validity of the verdict.

CRE 606(b) applies broadly, *Mollaun*, 194 P.3d at 416, reaching "everything which relates to the jury's deliberations, unless one of the exceptions applies." *Stewart*, 47 P.3d at 321 (quoting Christopher B. Mueller, *Jurors' Impeachment of Verdicts and Indictments in Federal Court Under Rule 606(b)*, 57 Neb. L. Rev. 920, 935 (1978)). It bars all "juror testimony or affidavits divulging juror deliberations, thought processes, confusion, mistake, intent, or other verdict impeaching grounds." *Stewart*, 47 P.3d at 322.

Defendant cites no Colorado case holding that parties may attack verdicts using statements made during deliberations, provided that no analysis of the deliberative process is necessary. Under CRE 606(b), three distinct categories of testimony are inadmissible during "an inquiry into the validity of a verdict," one of which is juror testimony regarding "*any matter or statement* occurring during the course of the jury's deliberations" (emphasis added). Because no other language in CRE 606(b) limits this broad prohibition, we do not deviate from the text of the rule. *See Black v. Waterman*, 83 P.3d 1130, 1136-38 (Colo. App. 2003) (applying CRE 606(b) to evidence supporting a motion for new trial).

Therefore, we conclude that CRE 606(b) controls the admissibility of these affidavits.

2. "Extraneous Prejudicial Information"

Colorado courts interpret "extraneous prejudicial information" to include physical materials and specific facts not admitted into evidence, as well as legal knowledge beyond that contained in jury instructions. *People v. Harlan*, 109 P.3d 616, 624-25 (Colo. 2005); *Kendrick*, 252 P.3d at 1064. However, such information does not include either "background professional and educational experience," *Kendrick*, 252 P.3d at 1066, or "personal knowledge, obtained before the trial began," *People v. Holt*, 266 P.3d 442, 445 (Colo. App. 2011). For example, a juror's mathematics and engineering background is not extraneous. *Kendrick*, 252 P.3d at 1067. In contrast, specific salary estimates, not offered in evidence, introduced by a juror during deliberations to calculate damages are extraneous. *Destination Travel, Inc. v. McElhanon*, 799 P.2d 454, 456-57 (Colo. App. 1990).

The Colorado Supreme Court's touchstone in identifying extraneous information is whether "the experience used by the juror in deliberations [is] part of the juror's background, gained before the juror was selected to participate in the case and not as the result of independent investigation into a matter relevant to the case." *Kendrick*, 252 P.3d at 1066. A clear application of this principle is *People v. Harlan*, 109 P.3d at 632. In finding a juror's use of a bible during deliberations extraneous, the supreme court explained:

> We do not hold that an individual juror may not rely on and discuss with the other jurors during deliberation his or her religious upbringing, education, and beliefs . . . . We hold only that it was improper for a juror to

> bring the Bible into the jury room to share with other jurors the written Leviticus and Romans texts during deliberations; the texts had not been admitted into evidence or allowed pursuant to the trial court's instructions.

Id.; *accord Holt*, 266 P.3d at 446.

Here, Juror 11's alleged statements of bias during deliberations illustrated beliefs about an ethnic minority group, formed by his experiences. His opinions were not the result of an independent investigation performed after being sworn to serve on the jury. Rather, Juror 11 viewed the testimony before him through the lens of his experiences and personal beliefs. While these beliefs may be repugnant, they are no more "extraneous" to deliberation than a juror's religious beliefs, as discussed in *Harlan*.

A few cases from other jurisdictions consider racial bias "extraneous prejudicial information."[3] These cases are unpersuasive because they do not provide, nor does defendant offer, a distinction between beliefs about race and religious beliefs, as discussed in *Harlan*. Nor

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[3] *E.g.*, *Tobias v. Smith*, 468 F. Supp. 1287, 1290 (W.D.N.Y. 1979) (conflating "extraneous prejudicial information" and "outside influence" exceptions when concluding, "[T]he statements in the juror's affidavit are sufficient to raise a question as to whether the jury's verdict was discolored by improper influences and they are not merely matters of jury deliberations."); *State v. Hidanovic*, 2008 ND 66, ¶¶ 21-27, 747 N.W.2d 463, 472-75 (mentioning granting a new trial based on the effect "extraneous" information has on an average jury, but basing admissibility on other theories). *Contra United States v. Benally*, 546 F.3d 1230, 1237-38 (10th Cir. 2008); *Martinez v. Food City, Inc.*, 658 F.2d 369, 373-74 (5th Cir. 1981); *State v. Shillcutt*, 119 Wis. 2d 788, 794-95, 350 N.W.2d 686, 690 (1984).

is any principle advanced that would limit this exception to racial bias. The lack of such a limiting principle would permit inquiry into juror preconceptions based on age, gender, religion, and sexual orientation. Such broad excursions into jury deliberations are "anathema" to the jury system. *Kriho*, 996 P.2d at 167. And faced with the specter of such inquiries, jurors would be unable to perform their public service without justifiable concern for their post-verdict privacy. *Stewart*, 47 P.3d at 322.

Therefore, we conclude that the "extraneous prejudicial information" exception is inapplicable.

3. "Outside Influence"

Colorado follows a plain language approach to the CRE 606(b) exceptions, *Stewart*, 47 P.3d at 323, looking to the analogous federal rule for guidance. *Id.* at 321. Thus, when deciding whether the "outside influence" exception applies, a court must determine if a force outside the jury room exerted improper influence on a juror. *Id.* at 320. Although rarely relied on independently of the "extraneous prejudicial information" exception, this exception includes efforts to bribe a juror, threats of violence against jurors, or other means "unrelated to the internal values of the jury." 27 Charles A. Wright & Victor J. Gold, *Federal Practice and Procedure* § 6075 (2d ed. 1993).

Here, the affidavits do not suggest interference from any party outside the jury room. To the contrary, the statements at issue illustrate Juror 11's beliefs and opinions, which, as explained above, lie at the core of what should be considered "internal." Defendant makes no coherent argument why these statements

made within the walls of the jury room were an "outside influence."

Therefore, we further conclude that the "outside influence" exception does not apply.

Accordingly, the juror affidavits were inadmissible under CRE 606(b).

IV. Constitutionality of CRE 606(b) As-Applied

Alternatively, defendant argues that, if none of the exceptions in CRE 606(b) applies, racial bias so taints a defendant's rights under the Fifth, Sixth, and Fourteenth Amendments that refusal to consider evidence of a juror's racially biased statements during deliberations renders CRE 606(b) unconstitutional as-applied. We do not decide whether considering evidence of such bias might be constitutionally required, however, because defendant waived his ability to challenge the verdict on this basis by failing to sufficiently question jurors about racial bias in voir dire.

A. Verdict Finality and Juror Privacy

CRE 606(b) codified common law protections of verdict finality and juror privacy, *Stewart*, 47 P.3d at 322, both of which are vital to the stability and freedom of the jury system. *Simpson v. Darwin Lee Stjernholm, D.C.*, 985 P.2d 31, 35 (Colo. App. 1998). Therefore, resolving an unconstitutional-as-applied challenge to CRE 606(b) requires determining what policy balance best protects trial by jury as a whole. *State v. Shillcutt*, 119 Wis. 2d 788, 802, 350 N.W.2d 686, 693 (1984); *see Michigan v. Lucas*, 500 U.S. 145, 149 (1991) (balancing policy concerns when determining the constitutionality of an evidentiary

rule under the Sixth Amendment), *cited with approval in People v. Aldrich*, 849 P.2d 821, 825 (Colo. App. 1992); *Ravin*, 788 P.2d at 820-21 (balancing policy concerns of CRE 606(b) with fairness concerns).

The United States Supreme Court balanced similar evidentiary and constitutional concerns in *Tanner v. United States*, 483 U.S. 107 (1987), which held that analogous Fed. R. Evid. 606(b) barred juror testimony of several jurors' intoxication during portions of the trial and deliberations. While acknowledging the Sixth Amendment right to trial by a competent jury, the majority declined to hold the rule unconstitutional as-applied. Rather, it concluded that voir dire and other factors[4] were sufficient to protect this right, despite the limitations of Fed. R. Evid. 606(b). *Id.* at 126- 27.

However, lower federal courts and state courts disagree whether the *Tanner* factors adequately protect a defendant's right to trial by an impartial jury where rules such as CRE 606(b) would bar evidence of a juror's racial bias. In *Benally*, 546 F.3d at 1240-41, the Tenth Circuit found the *Tanner* factors, in particular voir dire, sufficient to protect against racial bias. While the court acknowledged that some jurors might still be prejudiced, it concluded that any further protection would jeopardize "the great benefit of protecting jury decision-making from judicial review." *Id.* at 1241. For this reason, the court declined to hold Fed. R. Evid. 606(b) unconstitutional as applied. *Cf.*

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[4] These other factors are: the court's and counsel's ability to observe jurors during trial; the ability of jurors to report misconduct by other jurors before trial; and the ability to admit nonjuror testimony to show misconduct. *Tanner*, 483 U.S. at 127.

Williams v. Price, 343 F.3d 223, 239 (3d Cir. 2003) (declining on habeas petition to hold Fed. R. Evid. 606(b) unconstitutional as-applied).

Courts that are less confident in the protection given by the *Tanner* factors do not offer common reasoning. Some courts hold the analog to CRE 606(b) unconstitutional only when a juror misrepresented information about bias in voir dire. *E.g.*, *United States v. Henley*, 238 F.3d 1111, 1121 (9th Cir. 2001); *State v. Thomas*, 777 P.2d 445, 450-51 (Utah 1989). In effect, these courts read a constitutionally-compelled "voir dire exception" into the rule. Other courts reject this limited exception, instead conducting case-by-case analyses.[5] *E.g.*, *United States v. Villar*, 586 F.3d 76, 87-88 (1st Cir. 2009); *Fisher v. State*, 690 A.2d 917, 921 n.4 (Del. 1996); *Shillcutt*, 119 Wis. 2d at 805-06, 350 N.W.2d at 695. At least one court suggests support for both approaches. *E.g.*, *State v. Hidanovic*, 2008 ND 66 ¶¶ 24-26, 747 N.W.2d 463, 473-74 (citing with approval *Henley*, 238 F.3d at 1121, creating an exception for misrepresentation in voir dire, but also stating that "racial and ethnic bias cannot be condoned in any form and may deprive a criminal defendant of a right to a fair trial by an impartial jury"). And another

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[5] The Tenth Circuit has expressed concern about the lack of any limiting principle in a case-by-case approach: "If confidentiality can be breached whenever a court, after the fact, thinks the advantages of doing so are important enough, much of the damage has already been done." *Benally*, 546 F.3d at 1241. Nor have we been able to discern any limiting principle in the cases taking this approach. Hence, if an exception is made for evidence of racial bias, this exception would apply to a variety of biases, including gender, religion, and sexual orientation. *See id.* at 1240-41.

court envisions racial bias as exempted from the rule entirely. *Fleshner v. Pepose Vision Inst., P.C.*, 304 S.W.3d 81, 89-90 (Mo. 2010) (holding that, while "[j]uror testimony about matters inherent in the verdict should be excluded," racial considerations "should have no bearing on the outcome of a trial").

B. Waiver of Constitutional Challenge to Juror Bias

A defendant has a constitutional right to a fair trial by an impartial jury, which may be defeated by the presence of a biased juror. *People v. Lefebre*, 5 P.3d 295, 300 (Colo. 2000). Colorado courts recognize two forms of bias in potential jurors: "bias in fact or bias conclusively presumed as a matter of law." *People v. Macrander*, 828 P.2d 234, 238 (Colo. 1992) (quoting *United States v. Wood*, 299 U.S. 123, 133 (1936)). The latter form of bias is rooted in the potential juror's relationships or circumstances, *Lefebre*, 5 P.3d at 300, while actual bias is "a state of mind that prevents a juror from deciding the case impartially and without prejudice to a substantial right of one of the parties." *Macrander*, 828 P.2d at 238. Negative feelings against a defendant's race or ethnicity evince actual bias *Lefebre*, 5 P.3d at 300.

While the United States Constitution guarantees the right to a fair trial by an impartial jury, it does not provide a particular test to ensure this right. *Frazier v. United States*, 335 U.S. 497, 511 (1948); *Wood*, 299 U.S. at 133. In Colorado, the test for juror bias is codified in section 16-10-103(1)(j), C.R.S. 2012. *Nailor v. People*, 200 Colo. 30, 32, 612 P.2d 79, 80 (1980). This section provides that a potential juror should be excused for cause if there exists "a state of mind in the juror evincing enmity or bias toward the defendant or

the state." § 16-10-103(1)(j); *see Carrillo v. People*, 974 P.2d 478, 486 (Colo. 1999) (applying section 16-10-103(1)(j) when analyzing actual bias).

"The purpose of voir dire is to determine whether a juror is biased or prejudiced in any way." *People v. Binkley*, 687 P.2d 480, 483 (Colo. App. 1984), *aff'd*, 716 P.2d 1111 (Colo. 1986); *accord Garcia v. Estate of Wilkinson*, 800 P.2d 1380, 1382 (Colo. App. 1990). Colorado law recognizes that the ability to challenge jurors based on voir dire is "one of the most important rights secured to an accused." *Macrander*, 828 P.2d at 243 (quoting *Pointer v. United States*, 151 U.S. 396, 408 (1894)); *see Ma v. People*, 121 P.3d 205, 210 (Colo. 2005) ("Because a criminal defendant has the constitutional right to a fair trial by an impartial jury, *see* U.S. Const. amend. VI; Colo. Const. art. II, § 16, a trial court in a criminal case must grant all valid challenges for cause.").

Given the important role voir dire serves in assuring impartial juries, criminal defendants have both the right and the duty to secure an impartial jury through "diligent inquiry" into potential jurors' racial bias. *Maes v. Dist. Court*, 180 Colo. 169, 175-76, 503 P.2d 621, 624-25 (1972), *cited for this proposition in People v. Baker*, 924 P.2d 1186, 1191 (Colo. App. 1996), *disagreed with on other grounds by Craig v. Carlson*, 161 P.3d 648, 655 n.3 (Colo. 2007). Failure to adequately question potential jurors during voir dire waives both a later challenge to the juror and an attack on the verdict based on information that diligent voir dire would have uncovered. *People v. Lewis*, 180 Colo. 423, 427-28, 506 P.2d 125, 127 (1973); *Ma*, 121 P.3d at 209; *People v. Asberry*, 172 P.3d 927,

930 (Colo. App. 2007); *People v. Crespin*, 635 P.2d 918, 920 (Colo. App. 1981); *see People v. Cevallos-Acosta*, 140 P.3d 116, 121 (Colo. App. 2005) (declining to find error on appeal as presumptively biased juror was not properly questioned).[6]

C. Application

No Colorado court has addressed whether the *Tanner* factors are sufficient to protect the right to a jury free of racial bias. However, we need not decide the issue here. We have upheld the trial court's factual finding that defendant did not ask about racial bias during voir dire. *See* part II.C.1, *supra*. Thus, because defendant could have asked such questions and challenged Juror 11 for cause based on his answers, defendant waived the right to assert that, as applied here, CRE 606(b) violates his right to an impartial jury.[7] *See Valdez v. People*, 966 P.2d 587, 594 (Colo. 1998) (finding that a *Batson* challenge could not be considered on appeal, as it was "incumbent on the

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[6] Other jurisdictions are in accord. *See, e.g., State v. Shepherd*, 2009 UT App 11, ¶ 5 (discussing the "requirement that a criminal defendant explore known areas of potential bias with a prospective juror or else be deemed to have waived objection to the juror on grounds of bias"); *Holmes v. State*, 65 Md. App. 428, 439-40, 501 A.2d 76, 81 (1985) ("The State says that appellant's failure to object, coupled with his expressing satisfaction with the jury impaneled, is a comparable situation which mandates the same result. Notwithstanding [that] we believe that the trial judge's failure to voir dire the jury panel as to racial bias was error, we are constrained to agree with the State that appellant waived that error."), *rev'd*, 310 Md. 260, 528 A.2d 1279 (1987).

[7] If Juror 11 misrepresented his biases, post-trial relief could have been sought on that basis.

defense counsel" to raise the issue before the trial court); *Honda v. People*, 111 Colo. 279, 289-90, 141 P.2d 178, 184 (1943) (holding that the defendant waived any Equal Protection challenge to the exclusion of Japanese jurors from the jury because "[t]his issue he raised, not before the trial, but in his motion for a new trial, after the jury had been examined, selected and sworn and had tried the cause. This question was injected into the case too late to avail defendant anything.").

Defendant offers no reason to conclude here that diligent voir dire would have left his rights to a jury free of racial bias unprotected. Nor are we willing to assume that because voir dire is insufficient to protect against racial bias, waiver cannot be based on deficient voir dire. While racial issues create distinct challenges for trial counsel, many sources address conducting meaningful voir dire as to race.[8] Asking potential jurors about race may be sensitive. But appropriate lines of inquiry include asking about past experiences with racism, inquiring into positive or negative interactions with individuals of a particular race, or stating that race may be an issue in this case and asking if prospective jurors would be more comfortable serving on a different case. And the court or counsel

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[8] *See, e.g.*, Roberto Aron et al., *Trial Communication Skills* § 30:4 (2d ed. 2011); Alafair S. Burke, *Prosecutors and Peremptories*, 97 Iowa L. Rev. 1467, 1483-85 (2012) (discussing practices that prosecutors could implement to reduce Batson challenges and ensure a fair jury); *see generally* Tracy L. Treger, Note, *One Jury Indivisible: A Group Dynamics Approach to Voir Dire*, 68 Chi.-Kent L. Rev. 549, 567 (1992) (discussing a wide variety of voir dire techniques, including proper use of racial data and ways to limit harm from racial bias).

could forewarn potential jurors that, because they may be asked about bias, they have the option of being questioned in chambers. Here, similar techniques were used during defendant's voir dire, but not in the context of race.

Furthermore, while some prospective jurors may be hesitant to admit racial bias, prospective jurors may be hesitant to admit gender bias, religious bias, age bias, bias based on sexual orientation, or bias against a defendant's immigration status. Holding, as a matter of law, that voir dire was inadequate to address bias, racial or otherwise, would restrict section 16-10-103(1)(j), which allows challenges for cause based on bias, to personal bias against a specific defendant. Neither the statutory language nor any case supports such a restrictive approach.

Such a holding would defeat the core purpose of voir dire, which is to "determine whether any prospective jurors are possessed of beliefs that would cause them to be biased in such a manner as to prevent the defendant from obtaining a fair and impartial trial." *People v. Robinson*, 187 P.3d 1166, 1176 (Colo. App. 2008) (quoting *People v. Martinez*, 24 P.3d 629, 632 (Colo. App. 2000)); *accord Binkley*, 687 P.2d at 483. And such a holding would disregard the function of voir dire to alert the court, as does a contemporaneous objection, which "has a salutary purpose in the orderly administration of justice." *Scheer v. Cromwell*, 158 Colo. 427, 429, 407 P.2d 344, 345 (1965).

Although a purpose of voir dire is to identify potential juror bias, *see Binkley*, 687 P.2d at 483, the dissent's assertion that "a challenge for cause to a

juror's qualifications [being] waived through lack of diligence[] should only apply to cases where the basis for a challenge is known during voir dire" would discourage diligent voir dire concerning such bias. In a racially charged case, a defendant might avoid this subject in voir dire and gamble on a favorable verdict. In the event of an adverse verdict, the defendant could conduct post-verdict investigation of jurors and use information that might have been discovered through voir dire to attack the verdict. But a defendant is not "entitled to gamble on a more favorable verdict than that which he might otherwise have received and then, when such verdict is returned, have the option of having it set aside and calling for a new trial." *Ellis v. People*, 114 Colo. 334, 344, 164 P.2d 733, 737 (1945).

Colorado courts adhere to the rule that "[a] challenge for cause is waived if counsel does not use reasonable diligence during jury selection to determine whether the grounds for such a challenge exist." *Asberry,* 172 P.3d at 930. This waiver rule has never been limited, as the dissent urges, based on ignorance of what diligent inquiry could have unearthed. And our courts do not "reward . . self-induced ignorance." *McGee v. Hardina*, 140 P.3d 165, 167 (Colo. App. 2005). Hence, we decline to adopt such a limitation.

Furthermore, a waiver based on counsel's failure to adequately question jurors in voir dire is not subject to the "knowing, voluntary, and intentional" standard used for waivers of certain rights by defendants, as the dissent suggests it should be. Examples of waivers subject to this standard include the right to counsel, the right of a defendant to testify, the entrance of a guilty plea, *Hinojos-Mendoza v. People*, 169 P.3d 662,

669 (Colo. 2007), and the right to trial by jury. *Id.*; *People v. Norman*, 703 P.2d 1261, 1271 (Colo. 1985); *People v. Thompson*, 121 P.3d 273, 275 (Colo. App. 2005). However, "as to other rights [d]efense counsel stands as captain of the ship," *Hinojos-Mendoza*, 169 P.3d at 669 (quoting *People v. Curtis*, 681 P.2d 504, 511 (Colo. 1984)), and waiver need not be made personally by the defendant. *Arko v. People*, 183 P.3d 555, 558 (Colo. 2008).

No Colorado case holds that voir dire into juror bias, exercising challenges for cause, and passing the panel for cause are decisions made only by the defendant.[9] Rather, strategic decisions about voir dire are exercisable by counsel. *See People v. Moody*, 676 P.2d 691, 696 (Colo. 1984) (referring to decisions whether to challenge a juror as "merely a matter of trial strategy"); *People v. Osorio*, 170 P.3d 796, 800

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[9] Requiring that a defendant participate – knowingly, voluntarily, and intentionally – in voir dire and challenges for cause would be unworkable. For example, the trial court would have to fashion an advisement that explained the nuances of the tactical decisions made in voir dire. *Cf. People v. Arguello*, 772 P.2d 87, 94 (Colo. 1989) (requiring the record to "clearly show[] that the defendant understands the nature of the charges, the statutory offenses included within them, the range of allowable punishments thereunder, possible defenses to the charges and circumstances in mitigation thereof, and all other facts essential to a broad understanding of the whole matter" before finding a waiver of the right to counsel) (internal citations omitted). Then the court would need to obtain the defendant's consent to each proposed challenge for cause. The complexities of the tactical decisions required in voir dire, *see* 1 Kevin F. O'Malley et al., *Federal Jury Practice and Instructions* § 4:5 (6th ed. 2006) (discussing the importance of, and many strategies necessary for, analyzing the venire when selecting jurors), would leave such consent subject to dispute in postconviction proceedings.

(Colo. App. 2007) (determining a failure to challenge a biased juror to be "sound trial strategy"). And even though such decisions implicate constitutional rights, trial counsel has the power to bind the defendant.[10] *See Curtis*, 681 P.2d at 511 ("We have stated that decisions committed to counsel include . . . what jurors to accept or strike, and what trial motions to make. It is worth noting that these latter decisions also have a constitutional basis.") (internal citations omitted); *People v. Bergerud*, 223 P.3d 686, 693 (Colo. 2010) ("[W]hen a defendant chooses to have a lawyer manage and present his case, law and tradition may allocate to

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[10] *United States v. Zarnes*, 33 F.3d 1454 (7th Cir. 1994), and *United States v. Desir*, 273 F.3d 39 (1st Cir. 2001), cited in the dissent, do not suggest a different conclusion. In *Zarnes*, the defendant claimed that a bifurcated trial violated the Sixth Amendment. The circuit court held that the defendant had "knowingly and voluntarily" waived his claim based on a conversation with the trial court. *Zarnes*, 33 F.3d at 1472. The circuit court also found waiver because defense counsel had requested bifurcation. *Id.* (citing *United States v. Joshi*, 896 F.2d 1303 (11th Cir. 1990) (discussing that defendants waive their Sixth Amendment challenges when counsel makes a tactical decision to consent to bifurcation)). The circuit court did not apply the "knowing[] and voluntar[]y" standard that it applied when finding personal waiver by the defendant.

Desir involved a Fed. R. Crim. P. 33 motion for post-conviction relief based on "newly discovered" evidence. The defendant claimed that a juror was a personal acquaintance who knew of the defendant's criminal record, violating the right to an impartial jury. *Desir*, 273 F.3d at 42. The trial court determined that the defendant had recognized the juror before deliberations and, therefore, had waived his challenge. *Id.* at 42-43. The circuit court refused to disturb these findings, as they had record support, and upheld the trial court's denial of relief. *Id.* at 43. Neither court applied a "knowing and voluntary" standard to this waiver.

the counsel the power to make binding decisions of trial strategy in many areas. On issues of trial strategy, defense counsel is captain of the ship.") (internal citations omitted); *People v. Rogers*, 2012 COA ___, ¶ ___ (Colo. App. No. 11CA0019, Nov. 8, 2012) (citing *Cropper v. People*, 251 P.3d 434, 435 (Colo. 2011)) (acknowledging that counsel may waive a client's Sixth Amendment confrontation right).

Therefore, while counsel may, in fact, decide for strategic reasons not to question jurors on racial bias, a defendant cannot claim his rights were violated when an opportunity existed to protect those rights but his counsel failed to do so for tactical reasons. *See People v. Mann*, 646 P.2d 352, 358 (Colo. 1982) ("The decision not to serve [a key witness], when there was ample opportunity, was a trial tactic, subject to the risk of backfiring, and thus the defendant is not entitled to complain that she was deprived of the right to present testimony."); *People v. Peterson*, 656 P.2d 1301, 1304 (Colo. 1983) ("When defense counsel's strategy backfires, the resultant error cannot be urged as grounds for reversal on appeal."); *People v. Rowerdink*, 756 P.2d 986, 993 (Colo. 1988) ("[W]e held that, when defense counsel's strategy backfires, the resultant error cannot be grounds for reversal on appeal.").[11]

Alternatively, even if deficient voir dire does not constitute a waiver, courts should not "resolve constitutional questions or make determinations

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[11] By discussing adverse effects of trial strategy, we do not express an opinion on how an ineffective assistance of counsel claim based on these effects should be resolved.

regarding the extent of constitutional rights unless such a determination is essential and the necessity for such a decision is clear and inescapable." *Denver Publ'g Co. v. Bd. of County Comm'rs*, 121 P.3d 190, 194 (Colo. 2005); *accord People v. Lybarger*, 700 P.2d 910, 915 (Colo. 1985). Here, what adequate inquiry into racial bias would have uncovered is unknowable. However, defendant asks us to create a potentially broad constitutional exception to CRE 606(b) in order to vindicate a right that he failed to protect at trial. Hence, we decline to decide what additional constitutional safeguards, if any, would be necessary, had defendant diligently performed voir dire. *See Cropper*, 251 P.3d at 438 (declining to hold a statute unconstitutional as-applied because the defendant did not avail herself of the constitutional protections under the statute); *cf. New Safari Lounge, Inc. v. City of Colorado Springs*, 193 Colo. 428, 434-35, 567 P.2d 372, 377 (1977) (finding a statute constitutional as applied to the facts in the case but not deciding whether the statute would be unconstitutional under different facts); *Qwest Services Corp. v. Blood*, 252 P.3d 1071, 1087 (Colo. 2011) (holding that an as-applied challenge to a punitive damage award was not preserved, as no limited-purpose instruction was requested). Determining the extent that the Sixth Amendment requires protections beyond those already provided by law is neither necessary nor inescapable. *Cf. Kirkmeyer v. Dep't of Local Affairs*, ___ P.3d ___, ___ (Colo. App. No. 09CA0725, Mar. 31, 2011) (reaching constitutionality as-applied when interpreting a statute is "inextricably intertwined" with arguments on remand, while declining to do so otherwise).

Therefore, we conclude that because defendant failed to inquire into racial bias in voir dire, we will not decide whether the constitutional balance requires CRE 606(b) to yield.[12]

V Juror Access Limitations

Defendant contends that the trial court misapplied Crim. P. 24(a)(4) and Crim. P. 33(c) when limiting his access to jurors before the evidentiary hearing, interfering with his rights under the United States and Colorado Constitutions. However, this interference does not amount to constitutional error, and because any error in limiting access to jurors after trial was harmless, we do not reverse.

A. Standard of Review

Under the general harmless error standard, appellate courts reverse only when the record suggests that an error substantially affected the fairness of proceedings. *People v. Gaffney*, 769 P.2d 1081, 1088 (Colo. 1989). Yet, if the error is of a sufficient "constitutional dimension," reversal is required unless the error is harmless beyond a reasonable doubt. *People v. Smith*, 121 P.3d 243, 249 (Colo. App. 2005).

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[12] We take no position on whether *Benally*'s analysis of the *Tanner* factors would control appropriately preserved constitutional challenges to CRE 606(b).

B. Preservation

The Attorney General's assertion that defendant failed to preserve this issue is unpersuasive. Defendant moved for access to all juror contact information in anticipation of seeking an evidentiary hearing into grounds for new trial. Instead, the trial court required defense counsel to detail the "who, what, when, and where" of the alleged misconduct before limiting contact to only the female jurors. Further, defendant was allowed to obtain affidavits from only the two jurors who approached defense counsel after trial, reporting that Juror 11 was racially biased. Thus, the trial court denied defendant's motion, at least in part. Therefore, defendant is able to appeal the trial court's restrictions. *Cf. Resolution Trust Corp. v. Parker*, 824 P.2d 102, 104 (Colo. App. 1991) (finding objection to denial of motion for change of venue unnecessary for preservation on appeal).

C. Defendant's Argument

Defendant argues that the trial court abused its discretion by erroneously interpreting Crim. P 33(c)[13] as requiring affidavits substantiating claims of juror misconduct before allowing access to juror contact information. Defendant concedes that Crim. P. 33(c) requires a party to file supporting affidavits when moving for a new trial, but argues that the court's reliance on Crim. P. 33(c) *before* he moved for a new trial inappropriately barred access to jurors.

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[13] Crim. P 33(c) provides, in relevant part, "[a] motion based upon newly discovered evidence or jury misconduct shall be supported by affidavits."

In addition, defendant asserts that parties should have unfettered post-trial access to jurors absent evidence of harassment or criticism of the jurors' service. For this proposition, he cites public policy considerations[14] and Crim. P. 24(a)(4).[15] Defendant also argues that Crim. P. 24(a)(4) controls beyond voir dire and compelled the trial court to give defense counsel "appropriate and necessary locating information" for the jurors post-trial.

D. Analysis

The United States Constitution does not guarantee a defendant the right to question jurors post-verdict. *Cf. Haeberle v. Texas Int'l Airlines*, 739 F.2d 1019,

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[14] *E.g., Stewart*, 47 P.3d at 325 ("Jurors are free to discuss any aspect of their service they care to."); Model Code of Prof'l Responsibility EC 7-29 (1983) ("Were a lawyer to be prohibited from communicating after trial with a juror, he could not ascertain if the verdict might be subject to legal challenge."). Defendant asserts that these policy concerns amount to constitutional violations. Yet, the one case defendant cites for this proposition, *People v. Dillon*, 739 P.2d 919 (Colo. App. 1987), is inapplicable. *See id.* at 921(stating ineffective assistance of counsel must be predicated on "counsel's conduct so undermin[ing] the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result").

[15] "Orientation And Examination Of Jurors. An orientation and examination shall be conducted to inform prospective jurors about their duties and service and to obtain information about prospective jurors to facilitate an intelligent exercise of challenges for cause and peremptory challenges. (4) Jurors shall not be required to disclose personal locating information, such as address or place of business in open court and such information shall not be maintained in files open to the public. The trial judge shall assure that parties and counsel have access to appropriate and necessary locating information." Crim. P. 24(a).

1021 (5th Cir. 1984) ("Federal courts have generally disfavored post-verdict interviewing of jurors."); *Journal Publ'g Co. v. Mechem*, 801 F.2d 1233, 1236 (10th Cir. 1986) ("[C]ourts have routinely shielded jurors from post-trial 'fishing expeditions' carried out by losing attorneys interested in casting doubt on the jury's verdict."); *United States v. Riley*, 544 F.2d 237, 242 (5th Cir. 1976) (questioning of jurors is appropriate unless "there is some showing of illegal or prejudicial intrusion"). Defendant does not argue that we should interpret the Colorado Constitution more broadly that the United States Constitution in this regard. Thus, we discern no constitutional basis for defendant's juror access claim,[16] as opposed to misapplication of procedural rules. Hence, we apply the harmless error standard, and will not reverse unless the error substantially affected the fairness of the proceedings.

Assuming, while not deciding, that the trial court erred or abused its discretion in applying Crim. P. 24(a)(4) and Crim. P. 33(c), we find any error harmless. Defendant sought juror information to determine if Juror 11 had failed to disclose his law enforcement connections and possible biases in voir dire. After examining the voir dire, the court held an evidentiary hearing limited to Juror 11's law enforcement connections. Additional information that defendant could have obtained from jurors is irrelevant to the sole basis for the court's decision on the scope of the evidentiary hearing – what was asked in voir dire.

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[16] *See supra* note 14.

At the evidentiary hearing, Juror 11 was questioned about his law enforcement experience, as well as having friends and relatives who served in law enforcement. After hearing the testimony, the trial court determined that, given the high threshold to show actual bias, *supra* Part II.B, Juror 11's answers did not merit a new trial. We fail to understand, and defendant does not suggest, what additional questions Juror 11 would have been asked, had defendant contacted other jurors.

Even if defendant could have obtained from other jurors additional information of statements by Juror 11 showing actual bias, any statements made during deliberations would still be inadmissible under CRE 606(b). *Supra* Part III. And we have declined to adopt any exception for a racially biased juror, because we agree with the trial court that defendant failed to explore this subject in voir dire. *Supra* Part IV. Hence, even if defendant could have obtained other statements of bias made by Juror 11 during deliberations, the result would be the same.

Therefore, we conclude that any error was harmless.[17]

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[17] Our conclusion of harmlessness is not approval of the trial court's actions. The severe limitations on juror access seem unnecessary given defendant's legitimate interest in investigating possible constitutional violations.

VI. Impaneling a Numbers Jury

Finally, we conclude the trial court did not commit plain error by impaneling a numbers jury.

A. Standard of Review

When the defendant fails to object to a trial court empaneling a numbers jury, appellate review is for plain error. *People v. Robles*, ___P.3d___, ___ (Colo. App. No. 06CA0934, Mar. 31, 2011) (*cert. granted* Sept. 12, 2011). Plain error requires an error that is both obvious and so undermines a trial's fairness that it casts doubt on the reliability of the conviction. *Id.*

B. Analysis

A division of this court in *People v. Robles*, ___P.3d at ___, found that referring to jurors solely by number does not cast serious doubt on a trial's fairness when:

- Neither the court nor counsel commented on the use of numbers rather than names;
- There was no indication of the procedure being unusual;
- Neither the court nor the counsel indicated that referring to jurors by number implied that defendant was dangerous;
- Defendant was able to conduct meaningful voir dire despite use of numbers rather than names. *Id.*

The record shows these same factors here. The trial court told counsel that it was common practice to refer to jurors solely by number and no further mention was made of this process by anyone. Also, the use of numbers did not impact the effectiveness of voir

dire. Defendant does not indicate why *Robles* should not control and we decline to deviate from its reasoning.

Therefore, the trial court did not commit plain error.

VII. Conclusion

The judgment of conviction is affirmed.

JUDGE LOEB concurs.

JUDGE TAUBMAN dissents.

JUDGE TAUBMAN dissenting.

This case presents the important issue of whether CRE 606(b) must yield to the Sixth Amendment right to an impartial jury where evidence is presented of a juror's previously unknown racial bias arising during jury deliberations. Although this is an issue of first impression in Colorado, numerous state and federal courts are divided on the issue. Because I disagree with the majority that CRE 606(b) prohibits consideration of Juror 11's apparent racial bias, I respectfully dissent. To the contrary, I would hold that CRE 606(b) must yield to the Sixth Amendment right of defendant, Miguel Angel Pena-Rodriguez, to an impartial jury, because racial bias apparently influenced Juror 11's decision-making process. Accordingly, I believe the trial court erred by not considering evidence of racial bias arising during deliberations, and by limiting the scope of Pena-Rodriguez's motion for new trial to the issue of whether Juror 11 misrepresented his law enforcement background. Further, I would reverse Pena-Rodriguez's conviction and remand for further proceedings, because the trial court's error is not harmless beyond a reasonable doubt.

I. Background

I adopt the majority's recitation of the relevant facts, but reiterate those important to my dissent.

Following Pena-Rodriguez's trial and conviction, two affidavits from other jurors were obtained by Pena-Rodriguez's counsel. These affidavits stated, among other things, that Juror 11 had made

statements during jury deliberations which indicated he based his decision on racial bias.[1]

The first affidavit stated that Juror 11 said, "I think he did it because he is Mexican and Mexican men take what they want." The affidavit also stated that Juror 11 "made other statements concerning Mexican men being physically controlling of women because they have a sense of entitlement and think they can 'do whatever they want' with women." The second affidavit noted:

> [Juror 11] believed that the defendant was guilty because in his experience as [an] ex-law enforcement officer, Mexican men had a bravado that caused them to believe they could do whatever they wanted with women. . . . He said that where he used to patrol, nine times out of ten Mexican men were guilty of being aggressive toward women and young girls. . . . He said that he did not think the alibi witness

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[1] I recognize that courts have referred to people of Hispanic heritage as belonging to racial, ethnic, and national origin groups. *See, e.g.*, *Local Number 93, Int'l Ass'n of Firefighters v. City of Cleveland*, 478 U.S. 501, 504 (1986) (Hispanic firefighters alleged they had been discriminated against by reason of their race and national origin); *United States v. Villar*, 586 F.3d 76, 84 (1st Cir. 2009) (discussing jury discrimination against a Hispanic defendant as racial and ethnic bias); *People v. Mendoza*, 876 P.2d 98, 101 (Colo. App. 1994) (prima facie evidence of racial discrimination existed where the prosecution used five peremptory challenges to eliminate Hispanic jurors). However, because people of Hispanic heritage belong to a distinct racial group, I limit my discussion to racial prejudice. *Mendoza*, 876 P.2d at 101.

was credible because, among other things, he was "an illegal."

The trial court declined to consider this evidence in conjunction with Pena-Rodriguez's motion for a new trial, because Pena-Rodriguez did not question the jurors specifically regarding racial bias in voir dire, and because the court believed such testimony to be barred by CRE 606(b).

II. Preservation of Constitutional Challenge

The majority holds that because Pena-Rodriguez did not ask questions specifically related to racial bias during voir dire, his constitutional as-applied challenge to CRE 606(b) fails. I disagree.

A. Standard of Review

The majority applies an abuse of discretion standard and defers to the trial court's determination that Pena-Rodriguez did not ask sufficient questions regarding racial bias during voir dire. I disagree with the application of this standard, and would instead review the trial court's conclusion de novo.

Whether the questions asked during voir dire were sufficient is a mixed question of fact and law. *People v. Matheny*, 46 P.3d 453, 461-62 (Colo. 2002). Under this standard, historical facts are entitled to deference, while the application of those facts to a legal standard is reviewed de novo. *Id.* at 461. Further, whether a defendant waived his or her constitutional rights is a question we review de novo. *See People v. Bergerud*, 223 P.3d 686, 693 (Colo. 2010); *People v. Aguilar-Ramos*, 86 P.3d 397, 400-01 (Colo. 2004).

Here, the historical facts include questioning during voir dire. To the extent these facts were at issue, I would afford deference to the trial court's findings. However, whether the voir dire legally constituted a sufficient inquiry into potential racial bias is a question of law that must be reviewed de novo. Accordingly, I believe it is necessary to conduct a de novo review of whether the questions asked sufficiently addressed racial bias before deciding whether Pena-Rodriguez's failure to ask certain questions regarding racial bias constitutes a waiver of his right to an impartial jury.

B. Duty During Voir Dire

The majority relies on *Maes v. District Court*, 180 Colo. 169, 175-76, 503 P.2d 621, 624-25 (1972), to support the conclusion that Pena-Rodriguez had an obligation to explicitly question jurors regarding racial bias, and that his failure to do so resulted in a waiver of his constitutional right to a fair trial. However, I do not read *Maes* to create such an obligation.

In *Maes*, the defendant attempted to question potential jurors about racial bias during voir dire. *Id.* at 172, 503 P.2d at 623. The prosecution objected to such questioning. The trial court concluded that unless proof of the defendant's racial background would be presented, the defendant could not ask questions about race during voir dire. After assurances from the defendant's counsel that such proof would be presented, the trial court allowed the questioning. However, the defendant never offered proof regarding his racial background. *Id.* Accordingly, the trial court granted the prosecution's motion for mistrial. *Id.*

The supreme court reversed the trial court's ruling, holding that the defendant's "right to inquire on voir dire concerning prejudice against a person of a minority race" is undisputed. *Id.* at 175-76, 503 P.2d at 624-25. In dictum, the court added, "It was counsel's duty to make diligent inquiry into the existence of potential prejudice that might exist in the jurors' minds by reason of petitioner's racial heritage." *Id.* at 176, 503 P.2d at 625; *see also Hardesty v. Pino*, 222 P.3d 336, 340 (Colo. App. 2009) (where a statement of the court is not part of its "holding and its necessary rationale," it is dictum).

For two reasons, I do not read the court's dictum to create a rule that requires counsel to explicitly inquire into issues of racial bias. First, dictum is not controlling precedent. *Z.J. Gifts D-2, L.L.C. v. City of Aurora*, 93 P.3d 633, 640 (Colo. App. 2004). Second, even if the court's statement is controlling, it does not oblige defense counsel to explicitly question jurors regarding racial bias. Rather, it creates a right for counsel to ask questions necessary to eradicate racial bias from a jury.

As discussed below, Pena-Rodriguez's counsel asked sufficient questions during voir dire to satisfy this obligation. Counsel was not required to ask specifically about racial bias, because legitimate tactical considerations militated against doing so. In *United States v. Villari*, 586 F.3d 76, 87 n.5 (1st Cir. 2009)), the First Circuit recognized that,

> many defense attorneys have sound tactical reasons for not proposing specific voir dire questions regarding racial or ethnic bias because it might be viewed as insulting to

> jurors or as raising an issue defense counsel does not want to highlight. . . . [V]oir dire using questions about race or ethnicity may not work to a defendant's benefit where one of the [suspects] was described [based on his race].

Similarly, questions specifically addressing racial prejudice may be less effective in detecting racial bias than open-ended questions regarding a juror's ability to be fair. *See* Roberto Aron et al., *Trial Communication Skills* § 30:4 (2d ed. 2011) ("Counsel should ask potential jurors open-ended questions and let them talk about themselves, so as to better perceive those attitudes and beliefs potentially relevant to the case that might otherwise remain hidden.")[2] A juror would likely feel more comfortable stating that he or she may not be able to be fair to a defendant generally, rather than admitting in open court that he or she harbored racial prejudice. *See generally Smith v. Phillips*, 455 U.S. 209, 221-22 (1982) (O'Connor, J., concurring) ("[a] juror may have an interest in concealing his own bias"). Accordingly, trial counsel may decide that they would be more successful in detecting a biased juror through open-ended questioning, rather than questions addressing specific biases.

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[2] The majority opinion cites this authority, and others, to support its conclusion that Pena-Rodriguez should have asked questions specifically addressing racial bias. However, this authority notes that open-ended questions are better for detecting racial and other biases. Thus, this observation conflicts with the majority's assertion that specific questioning regarding bias was required to preserve Pena-Rodriguez's constitutional challenge.

Thus, it is unlikely the supreme court intended to create an absolute rule, which could cause a defendant's race to prejudice him or her. At most, *Maes* requires counsel to ensure that sufficient questions are asked during voir dire to determine whether the jurors are "capable and willing to decide the case solely on the evidence before [them]." *McDonough Power Equip., Inc. v. Greenwood*, 464 U.S. 548, 554 (1984); *People v. Wilson*, 114 P.3d 19, 24 (Colo. App. 2004) ("A trial court must receive some assurance from a prospective juror that he or she is willing and able to accept the basic principles of criminal law and to render a fair and impartial verdict based upon the evidence admitted at trial and the court's instructions.").

Here, sufficient questions were asked during voir dire to establish that the jurors would base their verdict on the facts of the case, rather than on bias or prejudice. Specifically, the jurors were asked whether they could "render a verdict solely on the evidence presented at trial and the law," without regard to "any other ideas, notion, or beliefs about the law." *See Wilson*, 114 P.3d at 24. They were also asked whether they had "a feeling for or against the Defendant." Accordingly, I conclude that Pena-Rodriguez did not have an obligation to ask questions specifically addressing racial bias.

C. Waiver of Constitutional Rights

Even if Pena-Rodriguez was obligated to ask further about racial bias, for three reasons his failure to do so would not result in a waiver of his constitutional right to an impartial jury. First, nothing in *Maes* suggests that the supreme court intended for

such a waiver to occur. Second, in reaching its conclusion that Pena-Rodriguez waived his rights, the majority cites five cases: *People v. Asberry*, 172 P.3d 927 (Colo. App. 2007); *Ma v. People*, 121 P.3d 205 (Colo. 2005); *People v. Crespin*, 635 P.2d 918 (Colo. App. 1981); *People v. Lewis*, 180 Colo. 423, 427-28, 506 P.2d 125, 127 (1973); and *People v. Cevallos-Acosta*, 140 P.3d 116, 121 (Colo. App. 2005), all of which are distinguishable. Third, Pena-Rodriguez did not waive his rights knowingly, voluntarily, and intelligently.

First, *Maes* did not address the question of waiver at all. Its above-quoted language about the "duty" of defense counsel was dictum, as noted above.

Second, the cases on which the majority relies are distinguishable. *Asberry*, *Ma*, *Crespin*, and *Lewis* are distinguishable because they involve waiver of a defendant's right to challenge a juror where the defendant knew of the juror's disqualifying characteristic, but failed to adequately challenge the juror on that ground. None of the cases cited by the majority involves an instance where the defendant was unaware of a juror's potential or actual bias. Here, however, Pena-Rodriguez had no knowledge of Juror 11's alleged bias. Accordingly, the rule set forth in these cases, that a challenge for cause to a juror's qualifications is waived through lack of diligence, should only apply to cases where the basis for a challenge is known during voir dire. Thus, these cases are distinguishable.

Cevallos-Acosta is also distinguishable, because the division declined to consider a denial of a challenge for cause because the defendant failed to preserve his challenge. 140 P.3d at 121. Here, however, defendant

preserved his challenge by moving for a new trial after receiving evidence of Juror 11's bias. Additionally, the juror in *Cevallos-Acosta* affirmatively stated that he could be impartial despite the defendant's race – thereby disproving the existence of actual bias under section 16-10-103(1)(j). 140 P.3d at 122.

Accordingly, these cases do not support the majority's conclusion that the failure to ask questions about race during voir dire prevents a defendant from making an as-applied constitutional challenge to CRE 606(b), based on previously unknown bias and the Sixth Amendment right to an impartial jury.

Third, Pena-Rodriguez did not waive his right to an impartial jury knowingly, voluntarily, and intentionally. Although there is no Colorado case discussing the waiver of a defendant's constitutional right to an impartial jury, our courts have held that a waiver of a defendant's Sixth Amendment right to a jury must occur knowingly, voluntarily, and intentionally. *Hinojos-Mendoza v. People*, 169 P.3d 662, 669 (Colo. 2007); *People v. Norman*, 703 P.2d 1261, 1271 (Colo. 1985); *People v. Thompson*, 121 P.3d 273, 275 (Colo. App. 2005). Similarly, waiver of other fundamental constitutional rights must be done by the defendant, knowingly, voluntarily, and intentionally. *Hinojos-Mendoza*, 169 P.3d at 669 ("The right to counsel, the right to testify, the right to trial by jury, and the entrance of a guilty plea are sufficiently personal and fundamental as to require a voluntary, knowing, and intentional waiver by the defendant himself."). The Sixth Amendment right to a jury, however, also requires that a jury be impartial. U.S. Const. amend. VI; *People v. Lefebre*, 5 P.3d 295, 300

(Colo. 2000). Accordingly, it would follow that a waiver of the right to an impartial jury would similarly have to be made knowingly, voluntarily, and intentionally. Federal courts have reached similar conclusions. *See United States v. Zarnes*, 33 F.3d 1454, 1472 (7th Cir. 1994) ("A waiver [of the right to an impartial jury] must be knowing and voluntary."); *see also United States v. Desir*, 273 F.3d 39, 43 (1st Cir. 2001) (a defendant waives his or her right to an impartial jury if he or she knowingly withholds information of jury bias from the court).

The majority cites *State v. Shepherd*, 2009 UT App. 11, ¶ 5 (unpublished memorandum decision), for the proposition that failure to adequately question jurors about racial bias during voir dire waives a Sixth Amendment challenge to an impartial jury. However, in *Shepherd*, the court only held that a defendant's waiver of the right to an impartial jury must be knowing. *Id.* (discussing the "requirement that a criminal defendant explore *known* areas of potential bias with a prospective juror or else be deemed to have waived objection to the juror on grounds of bias") (emphasis added). In *Shepherd*, the defendant was aware that the challenged juror knew him, but failed to bring this to the court's attention. *Id.* at ¶ 6. Accordingly, the court held that he knowingly waived his right to challenge the juror.

Holmes v. State, 65 Md. App. 428, 439-40, 501 A.2d 76, 81 (1985), *rev'd on other grounds*, 310 Md. 260, 528 A.2d 1279 (1987), stands for a similar proposition. *Id.* at 432-40, 501 A.2d at 78-83 (defendant waived his right to challenge the trial court's decision not to ask about race during voir dire

when he requested the judge to ask such questions, but then failed to object when the judge did not do so).

Finally, *People v. Rogers*, 2012 COA ___, ¶ ___ (Colo. App. No. 11CA0019, Nov. 8, 2012), is also distinguishable because it involves intentional waiver of a constitutional right. There, the defendant intentionally introduced testimonial evidence by opening the door to the evidence. *Id.* Here however, Pena-Rodriguez did not intentionally waive his right to challenge his verdict based on an impartial jury. Rather, he obtained assurances from the jurors during voir dire that they could decide the case impartially. That he did not explicitly explore the issue of racial bias does not constitute an intentional waiver of his right to an impartial jury.

Here, Pena-Rodriguez did not waive his right to an impartial jury knowingly and voluntarily. At no point before or during trial was he aware of Juror 11's apparent racial bias. Additionally, the lack of questioning specifically addressing racial bias cannot be considered a knowing and voluntary waiver of a fundamental constitutional right. *See People v. Curtis*, 681 P.2d 504, 514 (Colo. 1984) ("The courts do not presume acquiescence in the loss of fundamental constitutional rights, and therefore indulge every reasonable presumption against waiver."); *Palmer v. People*, 680 P.2d 525, 527 (Colo. 1984) (a knowing and voluntary waiver of a fundamental constitutional right cannot be inferred from silence).

Holding that the Sixth Amendment right to an impartial jury outweighs CRE 606(b) would not render section 16-10-103(1)(j) a nullity. As I state below, my opinion is limited to the facts in this case – apparent

racial prejudice of one juror. Section 16-10-103(1)(j), however, applies to any situation in which a juror's state of mind evinces bias against a party. Accordingly, while my opinion may limit application of this statute in those cases in which allegations arise of a racially biased juror, it does not render the statute a nullity.

Accordingly, I conclude Pena-Rodriguez did not waive his Sixth Amendment right to an impartial jury, and therefore may challenge Rule 606(b) as applied.

III. Sixth Amendment

Pena-Rodriguez asserts that CRE 606(b) is unconstitutional as applied because it prevents him from protecting his Sixth Amendment right to an impartial jury. I agree.[3]

A juror compromises the constitutional guarantees of our justice system when he or she forgoes his or her role as a fact finder and, instead, forms conclusions of guilt or innocence based on racial bias. "A racially biased juror sits with blurred vision and impaired sensibilities and is incapable of fairly making the myriad decisions that each juror is called upon to make in the course of a trial. To put it simply, he

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[3] I do not disagree with the majority's discussion of the general application and function of CRE 606(b) in section III.B. of the majority opinion. However, because I conclude that the Sixth Amendment requires consideration of racial bias arising during jury deliberations, I do not need to decide whether evidence of bias would also be admissible under the exceptions contained in CRE 606(b)(1) and (2). I would note, however, that federal and state courts have allowed consideration of such evidence under these exceptions, in rules identical to CRE 606. *See Tobias v. Smith*, 468 F. Supp. 1287, 1290 (W.D.N.Y. 1979); *State v. Bowles*, 530 N.W.2d 521, 236 (Minn. 1995).

cannot judge because he has prejudged." *Turner v. Murray*, 476 U.S. 28, 43 (1986) (Brennan, J., concurring). Thus, when the trial court obtains clear evidence of racial bias by a deliberating juror, the policy considerations supporting CRE 606(b) must yield to the Sixth Amendment right to an impartial jury. If we were to hold otherwise, "the jury system may survive, but the constitutional guarantee on which [the jury system] is based will become meaningless." *Tanner v. United States*, 483 U.S. 107, 142 (1987) (Marshall, J., concurring in part and dissenting in part).

Colorado courts have consistently held that "an impartial jury is a fundamental element of the constitutional right to a fair trial." *Morrison v. People*, 19 P.3d 668, 672 (Colo. 2000); *see also Harris v. People*, 888 P.2d 259, 264 (Colo. 1995) ("the right to trial includes the right to trial by an impartial jury empaneled to determine the issues solely on the basis of the evidence introduced at trial rather than on the basis of bias or prejudice for or against a party"); *People v. Chavez*, ___ P.3d ___, ___ (Colo. App. No. 08CA2144, July 21, 2011) (same). In the context of excusing jurors for cause, "[a] defendant's right to an impartial jury is violated if the trial court fails to remove a juror biased against the defendant." *Morrison*, 19 P.3d at 672. Thus, "[w]here a jury trial is granted, the right to a fair and impartial jury is a constitutional right which can never be abrogated." *Brisbin v. Schauer*, 176 Colo. 550, 552, 492 P.2d 835, 836 (1971), *overruled on other grounds by Marshall v. Kort*, 690 P.2d 219 (Colo. 1984).

The right to a jury free of racial bias is of particular importance. *See Aldridge v. United States*, 283 U.S. 308, 314 (1931) ("if any [juror] was shown to entertain a [racial] prejudice which would preclude his rendering a fair verdict, a gross injustice would be perpetrated in allowing him to sit"). Allowing a racially biased person to sit on a jury provides "[n]o surer way . . . to bring the processes of justice into disrepute." *Maes*, 180 Colo. at 176, 503 P.2d at 625 (quoting *Aldridge*, 283 U.S. at 315). Accordingly, courts must exercise the utmost care to ensure that verdicts are reached based on the facts of the case rather than racial bias. *See generally Smith*, 455 U.S. at 217 ("Due process means a jury capable and willing to decide the case solely on the evidence before it, and a trial judge ever watchful to prevent prejudicial occurrences and to determine the effect of such occurrences when they happen.").

Batson v. Kentucky, 476 U.S. 79 (1986), highlights the fundamental requirement of a jury that is free from racial bias and discrimination. There, the Supreme Court held that "[p]urposeful racial discrimination in selection of the venire violates a defendant's right to equal protection because it denies him the protection that a trial by jury is intended to secure." *Id.* at 86. In doing so, the Court noted its "unceasing efforts to eradicate racial discrimination" in jury selection. *Id.* at 85.

The interest in ensuring an impartial jury has led federal and state courts to recognize that "rule[s] against juror impeachment cannot be applied so inflexibly as to bar juror testimony in those rare and grave cases where claims of racial or ethnic bias

during jury deliberations implicate a defendant's right to due process and an impartial jury." *Villar*, 586 F.3d at 87; *see also Wright v. United States*, 559 F. Supp. 1139, 1151 (E.D.N.Y. 1983) ("Certainly, if a criminal defendant could show that the jury was racially prejudiced, such evidence could not be ignored without trampling the Sixth Amendment's guarantee to a fair trial and an impartial jury."), *aff'd*, 732 F.2d 1048 (2d Cir. 1984); *Fisher v. State*, 690 A.2d 917, 920 n.4 (Del. 1996) (the need to eradicate racial bias in juries outweighs the policy interests behind Delaware Rule of Evidence 606(b)). The Supreme Court recognized early on that, "it would not be safe to lay down any inflexible rule [banning juror testimony] because there might be instances in which such testimony of the juror could not be excluded without 'violating the plainest principles of justice.'" *McDonald v. Pless*, 238 U.S. 264, 268-69 (1915) (quoting *Mattox v. United States*, 146 U.S. 140, 148 (1892)).

As the majority opinion notes, numerous state and federal courts have admitted evidence of racial bias, arising from jury deliberations, through multiple theories – both constitutional and rule-based. *See, e.g.*, *Villar*, 586 F.3d at 84-88 (finding Fed. R. Evid. 606(b) unconstitutional as applied when it bars evidence of racial bias); *United States v. Henley*, 238 F.3d 1111, 1121 (9th Cir. 2001) (finding persuasive those cases admitting evidence of racial juror bias, but deciding the case on other grounds); *Tobias v. Smith*, 468 F. Supp. 1287, 1290 (W.D.N.Y. 1979) (admitting evidence under Rule 606(b)'s extraneous prejudicial influences exception); *Fleshner v. Pepose Vision Institute, P.C.*, 304 S.W.3d 81, 89 (Mo. 2010) (equal protection and the right to an impartial jury require admission of such

evidence); *State v. Hidanovic*, 747 N.W.2d 463, 474-75 (N.D. 2008) (the right to a fair trial and impartial jury would require Rule 606(b) to yield); *Fisher*, 690 A.2d at 920 n.4 (same); *see also* Leah S.P. Rabin, Comment, *The Public Injury of an Imperfect Trial: Fulfilling the Promises of* Tanner *and the Sixth Amendment Through Post-Verdict Inquiry into Truthfulness at Voir Dire*, 14 U. Pa. J. Const. L. 537 (2011).

On appeal, the People rely on *Tanner* and *United States v. Benally*, 546 F.3d 1230 (10th Cir. 2008).[4] However, I conclude that *Tanner* is distinguishable from cases involving issues of racial bias in juries. Therefore, I further conclude that *Benally* improperly relied on *Tanner*.

In *Tanner*, the defendant attempted to introduce juror testimony that during deliberations some jurors were intoxicated. *Tanner*, 483 U.S. at 116-17. The Supreme Court held that the juror testimony was barred by Fed. R. Evid. 606(b), when used to impeach the jury's verdict. *Id.* at 122. However, *Tanner* is

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[4] *Benally*, in turn, relied on *Williams v. Price*, 343 F.3d 223, 235-37 (3d Cir. 2003). *Benally*, 546 F.3d at 1236. There, the Third Circuit held that "state courts did not violate 'clearly established Federal law' in refusing to consider" statements regarding racial bias made during jury deliberations. *Williams*, 343 F.3d at 236. However, the court's analysis was limited to habeas corpus review. *Id.* at 228-29. Accordingly, judges and commentators have criticized *Benally*'s reliance on *Williams* in applying the holding to a direct appeal. *See, e.g.*, *United States v. Benally*, 560 F.3d 1151, 1154 (10th Cir. 2009) (Briscoe, J., dissenting), *denying reh'g en banc* 546 F.3d 1230; *Rabin*, 14 U. Pa. J. Const. L. at 547-48; Brandon C. Pond, Note, *Juror Testimony of Racial Bias in Jury Deliberations:* United States v. Benally *and the Obstacle of Federal Rule of Evidence 606(b)*, 2010 BYU L. Rev. 237, 246-47

distinguishable because it did not deal with racial bias and because the jurors' intoxication did not conclusively demonstrate that the jurors would be incapable of rendering an impartial and fair verdict. *Id.* at 126. The Court noted that the "allegations of *incompetence* [were] meager," and "[t]he only allegations concerning the jurors' ability to properly consider the evidence were [the affiant's] observations that some jurors were 'falling asleep all the time during the trial,' and that his own reasoning ability was affected on one day of the trial." *Id.* (emphasis in original). Additionally, potential incompetence because of intoxication is fundamentally different from racial prejudice – the latter being more insidious and less readily observable.

In contrast, here, according to the affidavit of another juror, Juror 11 said, "I think [Pena-Rodriguez] did it because he's Mexican, and Mexican men take whatever they want." This statement, if Juror 11 indeed made it, clearly demonstrates that, unlike the jurors in *Tanner*, Juror 11 did not fairly consider the evidence presented, and instead based his decision on Pena-Rodriguez's Hispanic background. Accordingly, *Tanner* is distinguishable.

Although *Tanner* is distinguishable, its rationale is helpful to analyze whether Pena-Rodriguez's Sixth Amendment right to an impartial jury outweighs the policy interests behind enforcing CRE 606(b). In *Tanner*, the Supreme Court balanced the defendant's Sixth Amendment right to an unimpaired jury[5] against

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[5] The Court's discussion in *Tanner* was limited to whether the defendant's right to an unimpaired jury allowed consideration of the juror testimony. *Tanner*, 483 U.S. at 126.

the policy interests in excluding juror testimony. 483 U.S. at 126-28. The Court noted that the policy interests include promoting the finality of judgments, "full and frank discussion in the jury room, jurors' willingness to return an unpopular verdict, and the community's trust in a system that relies on the decisions of laypeople." *Id.* at 120-21. In contrast, the Court concluded that four factors protect a defendant's Sixth Amendment right to an unimpaired jury: (1) the ability of the court and counsel to observe jurors during trial, (2) the ability of jurors to be questioned during voir dire, (3) the ability of jurors to report misconduct before a verdict is rendered, and the (4) ability of nonjurors to report juror misconduct. *Id.* at 127. Thus, the Court concluded that the defendant's Sixth Amendment right to an unimpaired jury must yield to the policy interests behind insulating deliberations. *Id.*

Here, however, the four *Tanner* factors do not provide adequate safeguards in the context of a juror motivated by racial bias. *See Villar*, 586 F.3d at 87. First, racial bias, unlike intoxication, is not a visible characteristic observable by the court or counsel. *See id.*

Second, the majority suggests that the Sixth Amendment does not require Rule 606(b) to yield because there is "no reason to conclude that diligent voir dire would have left [defendant's] rights to a jury free of racial bias unprotected." However, Justices of the Supreme Court have recognized that the protections provided by voir dire are insufficient to protect against racial bias, because jurors may be reluctant to admit their bigotry in open court. *See, e.g.*,

McDonough, 464 U.S. at 558 (Brennan, J., concurring) ("the bias of a juror will rarely be admitted by the juror himself, 'partly because the juror may have an interest in concealing his own bias and partly because the juror may be unaware of it" (quoting *Smith*, 455 U.S. at 221-22 (O'Connor, J., concurring))); *see also Villar*, 586 F.3d at 87 & n.5. Accordingly, voir dire is an insufficient protection against racial bias.

Third, it is unlikely that jurors will report juror misconduct prior to the verdict, because they are usually instructed by the court not to communicate with anyone outside the jury. Here, the court orally instructed the jury, "[D]uring [deliberations] you will not be able to communicate with anyone." The court also referred to the "confidential" nature of deliberations, and repeated that the jurors were not allowed to talk to anyone besides other jurors. Similar instructions were given in the adjournment instructions, which every juror read and signed. The adjournment instructions additionally emphasized that the jurors could not contact any attorney, witness, or party. Accordingly, it is possible that the jurors believed that they could not bring Juror 11's statements to the court's attention until after deliberations ended.

Fourth, nonjurors are not privy to deliberations, and thus would be unable to report racially biased statements made during jury deliberations. *See Villar*, 586 F.3d at 87; *cf. United States v. Provenzano*, 620 F.2d 985, 996-97 (3d Cir. 1980) (court considered statement from U.S. Marshal who saw jury members smoking marijuana outside the jury room).

Thus, the *Tanner* procedural protections are insufficient safeguards against racial prejudice. Accordingly, I conclude that the policy considerations behind CRE 606(b) do not outweigh a defendant's Sixth Amendment right to a fair trial.[6]

Contrary to the majority's conclusion, I do not believe that finding CRE 606(b) unconstitutional as applied in this case would open a Pandora's box to charges of racially biased jurors participating in jury deliberations. There are no published cases in Colorado involving evidence of racial bias arising during deliberations which is first discovered after a verdict. Thus, it does not appear to be a common occurrence. Additionally, my view here is limited to allegations of juror bias against distinct racial groups.[7] *See generally Hernandez v. New York*, 500 U.S. 352 (1991) (expanding the *Batson* analysis from discrimination against African-American jurors to Hispanic jurors); *Washington v. People*, 186 P.3d 594, 601 (Colo. 2008) ("African-Americans and Hispanics are 'distinctive groups' for the purposes of a fair cross-section analysis." (quoting *United States v. Weaver*, 267 F.3d 231, 240 (3d Cir. 2001))).

IV. Remedy

Having concluded the trial court erred, I would remand for an evidentiary hearing to determine

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[6] For these same reasons, I conclude that *Benally* was decided improperly, and therefore I decline to rely on it.

[7] For purposes of my dissent, I need not address whether the Sixth Amendment right to an impartial jury should trump CRE 606(b) in cases of alleged discrimination by jurors on the basis of gender, religion, sexual orientation, or immigration status.

whether Pena-Rodriguez was prejudiced by Juror 11's apparent racial bias. *See Villar*, 586 F.3d at 87-88 (the trial court is best positioned to determine whether a defendant is prejudiced by racial bias during deliberations).

I would direct the trial court on remand to conduct an evidentiary hearing to determine, at the very least, (1) whether Juror 11 made the statements of apparent racial bias attributed to him in the two affidavits; (2) whether Juror 11 based his decision of guilt on racial bias rather than the facts presented, (3) whether Juror 11's statements affected the views of other jurors, and (4) whether any other juror expressed racial bias. I would defer to the trial court to determine the best procedure for making such a determination. *Id.* However, I recognize that the passage of time may cause difficulty in securing further juror testimony. Accordingly, it would be within the trial court's discretion to base its determination on juror testimony, the affidavits already in the record, or some combination of both.[8]

V. Juror Contact Information

Having decided that I would remand the case for further proceedings, I need not determine whether a defendant has a right to unfettered access to juror information following trial. However, under the plain wording of Crim. P 24(a)(4), juror contact information in this case would be "appropriate and necessary."

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[8] While I would not order a specific procedure for the trial court to follow on remand, I would note that *Commonwealth v. McCowen*, 939 N.E.2d 735, 765-66 (Mass. 2010), provides a detailed example of one method of assessing juror bias.

Thus, without deciding the issue of whether an unfettered right to jury information exists, I would order the trial court to provide juror contact information to both parties to facilitate a complete investigation into potential bias. The trial court could limit defense counsel's contacts with jurors to the issue of racial bias.

Finally, providing such information in this case would not result in a "fishing expedition," because two juror affidavits already establish the possibility of a biased verdict.

Accordingly, I respectfully dissent.

APPENDIX C

Colorado Supreme Court 2 East 14th Avenue Denver, CO 80203	DATE FILED: June 15, 2015 CASE NUMBER: 2013SC9
Certiorari to the Court of Appeals, 2011CA34 District Court, Arapahoe County, 2007CR2311	
Petitioner: Miguel Angel Pena-Rodriguez, **v.** **Respondent:** The People of the State of Colorado	Supreme Court Case No.: 2013SC9
ORDER OF COURT	

Upon consideration of the Petition for Rehearing filed in the above cause, and now being sufficiently advised in the premises,

IT IS ORDERED that said Petition shall be, and the same hereby is, DENIED.

BY THE COURT, EN BANC, JUNE 15, 2015.

JUSTICE EID and JUSTICE MÁRQUEZ would grant the Petition.

Supreme Court, U.S.
FILED
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No. 15-606

In the Supreme Court of the United States

MIGUEL ANGEL PEÑA-RODRIGUEZ,
Petitioner,

v.

STATE OF COLORADO,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Colorado

BRIEF IN OPPOSITION FOR THE STATE OF COLORADO

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QUESTION PRESENTED

Like its Federal counterpart, Colorado's "no-impeachment" rule excludes juror testimony regarding what was said during deliberations when offered to challenge the validity of a verdict. Colo. R. Evid. 606(b); *see also* Fed. R. Evid. 606(b). Last term, in *Warger v. Shauers*, 135 S. Ct. 521 (2014), this Court held that application of a no-impeachment rule to exclude evidence of juror bias does not violate the Sixth Amendment right to an impartial jury

The question presented is:

Does the Sixth Amendment grant a defendant the right to override the no-impeachment rule and challenge his criminal conviction based on allegations that racially biased statements were made by one juror during jury deliberations?

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STATEMENT OF THE CASE

Colorado's no-impeachment rule provides that, with limited exceptions not applicable here, jurors may not testify as to statements made during deliberations if those statements will be used to challenge the validity of a verdict: "Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations ...." Colo. R. Evid. 606(b).[1] The Rule prohibits not only live testimony, but also affidavits or other evidence by a juror. *Id.*

This Rule, like its federal counterpart, "precludes courts from peering beyond the veil that shrouds jury deliberations." Pet. App. 6a; *see also Yeager v. United States*, 557 U.S. 110, 122 (2009) ("The jury's deliberations are secret and not subject to outside examination."). Colorado's Rule is "broad in scope" and has three fundamental purposes: "promot[ing] finality of verdicts, shield[ing] verdicts from impeachment, and protect[ing] jurors from harassment and coercion." Pet. App. 6a–7a (quoting *People v. Harlan*, 109 P.3d 616, 624 (Colo. 2005)).

In two key cases, this Court has rejected attempts to impose constitutional exceptions to no-impeachment rules. First, in *Tanner v. United States*, this Court

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[1] The exceptions to the Rule are that juror testimony is allowed as to "(1) whether extraneous prejudicial information was improperly brought to the jurors' attention, (2) whether any outside influence was improperly brought to bear upon any juror, or (3) whether there was a mistake in entering the verdict onto the verdict form." Colo. R. Evid. 606(b). Although Petitioner claimed in the courts below that the first exception applies in this case, he does not advance that argument here.

upheld the Federal no-impeachment rule with respect to a juror's allegations of intoxication and drug use by members of the jury. 483 U.S. 107, 115–16 (1987). The Court emphasized the "long-recognized and very substantial concerns [that] support the protection of jury deliberations from intrusive inquiry." *Id.* at 127 It concluded that even where a no-impeachment rule bars evidence of juror activity during deliberations, a defendant's Sixth Amendment rights are "protected by several aspects of the trial process." *Id.* Those include: (1) voir dire; (2) observation of the jury during trial by the court, counsel, and court personnel; (3) reports of misconduct by jurors before they render a verdict; and (4) nonjuror evidence of misconduct.

Second, last term in *Warger v. Shauers*, the Court unanimously declined to limit *Tanner*'s holding to juror competency, extending it to cases of juror bias. With respect to alleged bias revealed during deliberations, the Court held "that [Federal] Rule 606(b) applies to juror testimony during a proceeding in which a party seeks to secure a new trial on the ground that a juror lied [about her bias] during voir dire." 135 S. Ct. at 525. The Court declined to find the no-impeachment rule unconstitutional, reaffirming the sufficiency of the *Tanner* safeguards in cases of alleged juror bias. *Id.* at 529. Although the no-impeachment rule "remov[ed] one means of ensuring that jurors are unbiased," the Court emphasized that jury voir dire is "an essential means of protecting this right [to an impartial jury]" and that "juror impartiality is adequately assured by the parties' ability to bring to the court's attention any evidence of bias before the verdict is rendered, and to employ nonjuror evidence even after the verdict is rendered." *Id.* In a footnote, the Court noted that "extreme cases"

of bias may undermine the *Tanner* safeguards. *Id.* at 529 n.3. But the Court declined to address that issue or qualify its holding that claims of juror bias do not override the no-impeachment rule.

Here, Petitioner invites the Court to depart from its longstanding jurisprudence and begin creating constitutional exceptions to the no-impeachment rule.

Factual background. Miguel Peña-Rodriguez was born in Mexico and moved to the United States as a child. R. 755.[2] In May 2007, he was living and working as a horse keeper at the Arapahoe Race Track in Colorado. *Id.* at 501–02. Three sisters—ages 16, 15, and 14—were also staying at the racetrack, with their parents, in a room at the opposite end of the barn from Peña-Rodriguez. *Id.* at 367, 446–47, 461, 504–05, 514.

While the three girls were walking to a racetrack bathroom one evening, two men were talking and drinking beer near the bathroom entrance. *Id.* at 376–77, 449, 453–54. The girls knew one of the men as "Hugo." *Id.* at 377, 449. After the girls went into the bathroom, the man who had been talking to Hugo entered and asked if the girls wanted to "drink or party," to which they said no. *Id.* at 377–78. One of the girls left the bathroom immediately, and the other two told the man to leave. *Id.* at 379, 402–03. Instead, he turned off the lights and grabbed the girls. *Id.* at 379–80, 469. One girl felt his hands on her lower back and buttocks, while the other felt his hand on her right shoulder, moving down toward her breast before she was able to push it off. *Id.* at 469, 472, 489. After a

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[2] The transcripts of the hearings and the trial are contained in a single PDF file. Citations are to the PDF pagination.

struggle, the girls freed themselves and left the bathroom. *Id.* at 382–83.

The girls told their parents what had happened, describing the assailant as the man who had been with Hugo and who was staying at the other end of the barn. *Id.* at 384, 419. Their dad immediately knew they were talking about Peña-Rodriguez and ran to the other side of the barn to try to find him. *Id.* at 506, 517. Unable to find him, the girls' father informed the racetrack security guard of the incident. While speaking to the guard, he saw Peña-Rodriguez speeding away in his pickup truck. *Id.* at 508–11.

Based on information provided by the girls and their father, police located and arrested Peña-Rodriguez later that night. He admitted that he had drunk "four or five beers in the last four hours," and during separate one-on-one showups,[3] the two girls identified—with certainty—Peña-Rodriguez as the man who had entered the bathroom. *Id.* at 385–88, 429, 477–78, 574.

Trial. Peña-Rodriguez was charged in state court with felony attempted sexual assault and with three misdemeanors: one count of unlawful sexual contact and two counts of harassment. PR., Vol. 1, p. 63. Prior to voir dire, the judge told defense counsel that "in the past, some of our jurors have been vocal in their dislike of people who aren't in the country legally. So I don't know if that's an issue for you or your client, but you

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[3] The showups were conducted on a roadside inside the race track. Each victim was separately brought to the scene and made the identification from inside a police car, with Peña-Rodriguez standing by his truck with lights illuminating the area. R. 574.

may want to address it." R. 191. During voir dire, however, defense counsel did not mention race, national origin, or immigration status; nor did he ask any questions about the prospective jurors' views on or experiences with race. R. 307–320; Pet. App. 36a.

During the trial, defense counsel did not challenge the evidence establishing that a sex crime had been committed or that the assailant was a Hispanic male. Instead, the defense told the jury that "this is a case about misidentification" and focused on whether Peña-Rodriguez was properly identified as the assailant. R. 357 The two victims took the stand and identified Peña-Rodriguez as the man who had entered the bathroom and whom they had identified during the on-site identification. *Id.* at 378–79, 450, 454, 467, 475–76. Peña-Rodriguez exercised his right not to testify; he presented a single alibi witness, a friend and co-worker who claimed that Peña-Rodriguez had been visiting him in a different nearby stable during the time of the assault. *Id.* at 603–06, 610–11, 613.

During closing arguments, the defense did not deny that a Hispanic male had assaulted the girls, but instead focused almost exclusively on challenging the identification evidence. Specifically, defense counsel highlighted apparent inconsistencies in the victims' descriptions of the specifics of the crime and the assailant's clothing, the police's failure to take fingerprints from the bathroom light switch, and the prosecution's failure to produce Hugo as a witness. *Id.* at 638–55.

The case went to the jury, which at one point during deliberations sent the court a note saying only "The jury is hung, Judge." *Id.* at 673. The court encouraged

the jurors to continue to attempt to reach a verdict. *Id.* at 675–76. Later that afternoon, the jury sent a note explaining that they had reached verdicts on three of the four charges, but could not reach a verdict on the fourth. *Id.* at 676. After approximately 12 total hours of deliberation, the jury remained unable to reach a verdict on the felony attempted sexual assault count but returned guilty verdicts on the three misdemeanor counts. *Id.* at 682–83. The court imposed a two-year supervised probation sentence. *Id.* at 767, 773.

Juror affidavits and post-verdict proceedings. Two of the jurors spoke with defense counsel after trial, alleging that Juror 11 had made statements during deliberations that evidenced racial bias. As part of a motion for a new trial, defense counsel prepared and submitted affidavits from the two jurors.

The first affidavit said that Juror 11 "made the following statement concerning the Defendant: 'I think he did it because he's Mexican and Mexican men take whatever they want.'" PR. Vol. 1, p. 249. The affidavit also asserted that Juror 11 "made other statements concerning Mexican men being physically controlling of women because they have a sense of entitlement and think they can 'do whatever they want' with women." *Id.*

The second affidavit paraphrased Juror 11 as having said, among other things, that "[h]e believed that the defendant was guilty because in his experience as an ex-law enforcement officer, Mexican men had a bravado that caused them to believe they could do whatever they wanted with women." *Id.* at 251.

Neither affidavit asserted that any other jurors agreed with or responded to Juror 11's alleged statements or that they had any effect on the deliberations or verdict.

Defense counsel argued that these affidavits entitled Peña-Rodriguez to a new trial because they showed Juror 11 had deliberately concealed his bias during voir dire. While acknowledging that Rule 606(b) prohibits the use of juror affidavits, counsel argued that the "extraneous prejudicial information" exception applied. The trial court denied the motion, concluding that there was no evidence that Juror 11 had concealed his alleged bias since no direct inquiry into racial bias was made during voir dire. R. 714–15, 723–26.

Appellate Proceedings. On appeal, Peña-Rodriguez challenged his conviction on several grounds, including by arguing for the first time that application of Rule 606(b) is unconstitutional if it prohibits evidence that could otherwise vindicate a constitutional right. The Colorado Court of Appeals affirmed, concluding that Peña-Rodriguez waived his as-applied constitutional challenge to Rule 606(b) because he "fail[ed] to sufficiently question jurors about racial bias in voir dire." Pet. App. 45a. Even if the challenge had not been waived, the court declined to "create a potentially broad constitutional exception to [Rule] 606(b) in order to vindicate a right that he failed to protect at trial." *Id.* at 57a.

One judge dissented, arguing that the failure to ask about race at voir dire should not be a waiver of Petitioner's constitutional challenge because there are "legitimate tactical considerations" against doing so and because any waiver would have to be done

"knowingly, voluntarily, and intelligently" by the defendant. *Id.* at 69a, 71a–72a. (Taubman, J., dissenting).

The Colorado Supreme Court declined to find that Peña-Rodriguez waived his constitutional challenge but nonetheless affirmed, relying on this Court's decisions in *Tanner* and *Warger*. It held that "this case law compels the conclusion that CRE 606(b) was not unconstitutional as applied to Petitioner," adding that "[a] contrary holding would ignore both the policy underlying CRE 606(b) and the unwavering Supreme Court precedent emphasizing the magnitude of that policy." *Id.* at 14a.

Three justices dissented, arguing that "where, as here, evidence comes to light that a juror specifically relied on racial bias to find the defendant guilty, CRE 606(b) must yield to the defendant's constitutional right to an impartial jury." *Id.* at 17a.

REASONS FOR DENYING THE WRIT

I. There has been no split in authority since this Court decided *Warger*.

This Court addressed the interplay between a no-impeachment rule and the Sixth Amendment just last term. In *Warger v. Shauers*, the question was whether Federal Rule of Evidence 606(b) could constitutionally exclude evidence that a juror in a car accident case had concealed during voir dire the fact that her daughter had killed a man in a car accident. 135 S. Ct. at 524. The Court rejected the constitutional challenge, holding that the principles identified in *Tanner* foreclosed "any claim that Rule 606(b) is unconstitutional in circumstances such as these." *Id.* at 529. The Court recognized that even though a no-impeachment rule removes "one means of ensuring that jurors are unbiased," juror impartiality is nonetheless "adequately assured by the parties' ability to bring to the court's attention any evidence of bias before the verdict is rendered, and to employ nonjuror evidence even after the verdict is rendered." *Id.* Thus, even if not all four *Tanner* factors provide protection in a particular case, this Court has concluded that the remaining factors can be sufficient to avoid constitutional infirmity.

In a footnote, *Warger* left open the possibility that "[t]here may be cases of juror bias so extreme that, almost by definition, the jury trial right has been abridged." *Id.* at 529 n.3. However, the Court declined to reach the issue and left its holding unqualified.

The *Warger* decision added significant clarity and weight to this Court's jurisprudence regarding the

interplay between no-impeachment rules and the Sixth Amendment—an issue that the Court had not addressed in more than 25 years. That decision held that no-impeachment rules may be constitutionally applied in cases of juror bias, not just juror impairment. It also arguably rejected the narrow reading of *Tanner* adopted in the *Villar* line of cases and advocated by Petitioner here. *See* Pet. 11–15 (relying on *United States v. Villar*, 586 F.3d 76 (1st Cir. 2009)).

The lower courts have not yet had a sufficient opportunity to apply this Court's guidance in *Warger* or to consider whether and when a case might involve "extreme" juror bias. *See* 135 S. Ct. at 529 n.3. Petitioner's asserted split of authority relies almost exclusively on pre-*Warger* cases, *see* Pet. 10–16, and there is *no* split among the post-*Warger* cases cited in the Petition. Both the Colorado Supreme Court in this case and a Pennsylvania federal district court have concluded that a racial bias exception to no-impeachment rules is not warranted. *See Smart v. Folino*, No. 3:CV-10-1447, 2015 U.S. Dist. LEXIS 43582, at *16–27 (M.D. Pa. Apr. 2, 2015) (in habeas proceeding, relying on *Warger* to reject claim that no-impeachment rule "improperly tied the hands of the state court from hearing evidence from one juror as to what [racial comment] another juror said in deliberation to demonstrate the other juror lied during voir dire"). For now, there is no confusion in the lower courts to remedy: Petitioner does not cite a single court decision that has applied footnote 3 from *Warger* to find a case of extreme juror bias.

II. This case is a poor vehicle for resolving whether the Sixth Amendment requires a general exception to no-impeachment rules for allegations of racial bias.

This case is a poor vehicle for addressing the impact of juror racial bias on no-impeachment rules because (1) the evidence indicates that a single juror's alleged racial bias had no effect on the jury's deliberations, and (2) Petitioner's counsel failed to ask the jury in voir dire about possible racial or ethnic bias and therefore likely waived his constitutional claim.

First, the circumstances of Peña-Rodriguez's conviction indicate that racial bias did not infect the jury deliberations. Neither the commission of a sex crime nor the race of the perpetrator was disputed at trial. To the contrary, the defense argued merely that this was "a case about misidentification," R. 357, attempting to neutralize the identification evidence by establishing that many Hispanic men worked and lived at the race track, *id.* at 396–97 The prosecution undercut that effort with overwhelming evidence that the assailant was Peña-Rodriguez, rather than a different Hispanic man, including the victims' identification of him as the man who had entered the bathroom. *Id.* at 386, 475–77. The alibi defense was also refuted by the victims' father, who testified that Peña-Rodriguez's truck was parked by his room when the girls reported the assault and that he saw Peña-Rodgriguez speeding away in his truck shortly afterward. *Id.* at 509–10. Given the evidence at trial and the defense's presentation of its case, one juror's alleged racial bias could not have altered the outcome.

Additionally, the jury's extensive deliberations and failure to reach a verdict on the most serious (and only felony) count shows that Petitioner's convictions were the result of careful examination of the evidence presented, rather than a product of racial bias. Thus, "[t]his is not a case ... where the verdict itself was shown to be based on the defendant's race rather than on the evidence and the law." *United States v. Benally*, 546 F.3d 1230, 1241 (10th Cir. 2008); *see also Kittle v. United States*, 65 A.3d 1144, 1156 (D.C. 2013) ("If the verdict had been affected by racial bias ... it is arguably likely that appellant would have been convicted of all counts."); *United States v. Arzola-Amaya*, 867 F.2d 1504, 1514 (5th Cir. 1989) ("The jury's ability to discern a failure of proof of guilt of some of the alleged crimes indicates a fair minded consideration of the issues[.]"); *State v. Brown*, 62 A.3d 1099, 1110 (R.I. 2013) (affirming that "allegations of juror bias did not warrant an evidentiary hearing" because "the jury returned a mix of convictions and acquittals"). Contrary to Petitioner's assertion, it is therefore unlikely that a decision by this Court in his favor would lead to a new trial.[4]

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[4] Petitioner asserts that the jury initially was "unable to reach a verdict on any of the charges," and was "deadlocked on all four charges," Pet. 4, 18; *see also* Law Professors Amicus Br. 20; NAACP Amicus Br. 10. However, this assertion is not supported by the affidavits and cannot be ascertained from the jury note stating only that the jury was "hung." R. 674. Likewise, Petitioner's assertion that "[t]he jury's difficulty in reaching a decision may have 'liberat[ed]' it to rely on non-evidentiary factors such as race" is mere speculation. Pet. 18. The more likely explanation is that the jurors took seriously their duty to carefully weigh the evidence and arrive at a considered verdict—an explanation buttressed by the jurors' decision to *acquit* Petitioner of the sole felony count.

Finally, the juror affidavits themselves do not claim that Juror 11's alleged bias persuaded or affected any juror's opinion, nor do they call the verdict into question. *See Kittle*, 65 A.3d at 1156–57 (racially biased remarks during deliberations "did not jeopardize appellant's constitutional right to an impartial jury" where the complaining juror "did not call the verdict into question" and the jury never "indicated a concern with racial bias" in its communications with the court). If the complaining jurors felt that their vote to convict Peña-Rodriguez on multiple misdemeanor counts, but acquit him of a felony count, was affected by Juror 11's bias, they likely would have said so. At the least, defense counsel could have asked this question of them.

Second, Petitioner's counsel failed to ask any questions about race or ethnicity during voir dire. The Colorado Court of Appeals held that this amounted to a waiver of his ability to challenge the alleged racial bias post-verdict. Pet. App. 45a. Although the Colorado Supreme Court disagreed, a finding of waiver comports with the great weight of case law.

"Voir dire plays a critical function in assuring the criminal defendant that his Sixth Amendment right to an impartial jury will be honored." *Rosales-Lopez v. United States*, 451 U.S. 182, 188 (1981) (plurality opinion); *see also Warger*, 135 S. Ct. at 528–29 ("[W]e have made clear that voir dire can be an essential means of protecting [the right to an impartial jury]."); *People v. Binkley*, 687 P.2d 480, 483 (Colo. App. 1984) ("The purpose of voir dire is to determine whether a juror is biased or prejudiced in any way."). Thus, courts have recognized that the right to challenge alleged juror bias under the Sixth Amendment can be waived,

including through failure to conduct an adequate voir dire or failing to object after voir dire reveals potential juror bias. *See, e.g.*, *Morales v. Thaler*, 714 F.3d 295, 304 (5th Cir. 2013) (the right to assert a violation of the Sixth Amendment right to an impartial jury "is subject to waiver ... [and] subject to the legitimate strategic or tactical decision-making processes of defense counsel during the course of trial"); *Robinson v. Monsanto Co.*, 758 F.2d 331, 335 (8th Cir. 1985) ("[T]he right to challenge a juror is waived by failure to object at the time the jury is empaneled if the basis for objection might have been discovered during voir dire."); *United States v. Ragland*, 375 F.2d 471, 475 (2d Cir. 1967) ("Failure to object to the composition of the jury has long been held to result in a waiver of the right of the accused to be heard by an impartial jury.").[5]

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[5] *See also United States v. Johnson*, 688 F.3d 494, 501 (8th Cir. 2012) ("[B]y failing to object to the seating of [an allegedly biased juror] during voir dire, Johnson intentional[ly] relinquish[ed] or abandon[ed] ... a known right[,] ... and thereby waived his right to challenge the impaneling of an allegedly biased juror on direct appeal.") (quotation omitted); *United States v. Diaz-Albertini*, 772 F.2d 654, 657 (10th Cir. 1985) ("[A] defendant, by accepting a jury, waives his right to object to the panel."); *United States v. Harris*, 530 F.2d 576, 579 (4th Cir. 1976) ("Where the basis for a challenge to a juror could be timely shown the failure of the defendant to object at the inception of the trial constituted a waiver of his right to challenge the composition of the jury."); *Hung Ma v. People*, 121 P.3d 205, 209 (Colo. 2005) ("A challenge for cause is waived if counsel fails to use reasonable diligence during jury selection to determine whether the grounds for such a challenge exist," and "[t]he test for reasonable diligence is whether counsel took the opportunity to adequately question a prospective juror."); *Holmes v. State*, 501 A.2d 76, 81 (Md. Ct. Spec. App. 1985) (although "the trial judge's failure to voir dire the jury panel as to racial bias was

Here, Peña-Rodriguez waived his right to challenge the validity of his guilty verdict on the basis of alleged racial bias by failing to adequately question prospective jurors during voir dire. *See* Pet. App. 50a. In voir dire, his counsel did not ask about or refer at all to race, nationality, or immigration status, despite the trial court's pre-voir dire admonition that past jurors had expressed a "dislike of people who aren't in the country legally " R. 191. Because asking such questions in this case would have given counsel the opportunity to uncover Juror 11's alleged bias, Peña-Rodriguez's failure to do so waived his ability to now challenge the verdict based on that bias.

Peña-Rodriguez argues that "asking direct questions about racial bias is usually ineffective" because "jurors are unlikely to self-identify as racially prejudiced or to make racially biased statements during voir dire." Pet. 24. But this Court's precedent recognizes that voir dire questions, even on the sensitive subject of race, can be effective—indeed, the Court *requires* direct voir dire inquiry into racial bias under certain circumstances. *Rosales-Lopez*, 451 U.S. at 185–86, 190 (plurality opinion);[6] *see also Ham v. South Carolina*, 409 U.S. 524, 526–27 (1973); *Aldridge v. United States*, 283 U.S. 308, 310 (1931) (reversing black defendant's conviction for murder of a white policeman because trial court refused to ask prospective jurors whether they entertained any racial

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error," defendant "waived that error" based on his "failure to object ... [and] his expressing satisfaction with the jury impaneled").

[6] Two additional Justices in *Rosales-Lopez* generally agreed with the four-Justice plurality, but would have granted the trial judge broader discretion. 451 U.S. at 194 (Rehnquist, J., concurring).

prejudice). Petitioner himself recognizes that "a trial court must question prospective jurors specifically about racial prejudice when there is 'a significant likelihood that racial prejudice might infect'" a trial. Pet. 28 (quoting *Ristaino v. Ross*, 424 U.S. 589, 598 (1976)).

And, as the Colorado Court of Appeals noted below, there are various ways to "conduct[] meaningful voir dire as to race" without relying solely on 'direct questions about the jurors' racial bias. Pet. App. 51a. (citing sources and listing "appropriate lines of inquiry," including "past experiences with racism" and "positive or negative interactions with individuals of a particular race").

Because Peña-Rodriguez entirely failed to use the chief mechanism for discovering and eliminating juror bias—voir dire—he has waived his ability to claim that the Colorado courts' application of Rule 606(b) violated his Sixth Amendment rights.

III. The Colorado Supreme Court correctly concluded that excluding juror testimony in this case did not violate the Sixth Amendment.

Petitioner argues that the Colorado Supreme Court erred in not creating a constitutional exception to Rule 606(b) for racial bias. To the contrary, the court correctly applied *Tanner* and *Warger* in refusing to create such a broad exception.

First, the factors that this court identified in *Tanner* can appropriately be applied in cases of alleged racial bias. As this Court held in *Warger*, not every factor need be present in every case, 135 S. Ct. at 529, and

here several factors counsel in favor of declining to graft exceptions to the no-impeachment rule. The ability to ask voir dire questions that elicit jurors' views on race, as discussed above, is a key protection for defendants who avail themselves of it. Similarly, jurors may report inappropriate comments or behavior by their fellow jurors prior to rendering their verdict. *See, e.g.*, *Lee v. United States*, 454 A.2d 770, 774 (D.C. 1982) (during deliberations, jurors sent judge a note suggesting that foreperson was incapacitated) (cited in *Tanner*, 483 U.S. at 127); *see also Black v. Waterman*, 83 P.3d 1130, 1137 (Colo. App. 2003) (allowing introduction of affidavit alleging that a juror privately admitted bias to a fellow juror during voir dire). Even the ability to observe the jury could potentially provide relevant evidence of racial bias—such as if racially biased comments are made outside the jury room. *See Tanner*, 483 U.S. at 127 (citing *United States v. Provenzano*, 620 F.2d 985 (3d Cir. 1980) (federal marshal observed improper juror activity outside of normal court hours)).

Second, the Colorado Supreme Court properly rejected Petitioner's argument that racial bias "stand[s] apart from other forms of partiality" and must be treated as "the extreme case" that "requires a constitutional exception." Pet. 21, 24. There is no question that racial bias is reprehensible and should never be the basis for a verdict. But as the Colorado Supreme Court noted, although "neither *Tanner* nor *Warger* involved the exact issue of racial bias," this Court's jurisprudence does not warrant creating "a dividing line between different *types* of juror bias or misconduct, whereby one form of partiality would implicate a party's Sixth Amendment right while

another would not." Pet. App. 14a–15a (emphasis in original).[7] Nothing in *Warger* supports Petitioner's extreme position. And even the decision in *Villar*, on which Petitioner relies heavily, did not go as far as suggesting that a no-impeachment rule must yield whenever there is an allegation of racial bias. Instead, that court "emphasize[d] that not every stray or isolated off-base statement made during deliberations requires a hearing at which jury testimony is taken," and limited its holding to "those rare and grave cases where claims of racial or ethnic bias during jury deliberations implicate a defendant's right to due process and an impartial jury." 586 F.3d at 87

Third, in addition to problems with protecting the privacy of deliberations and avoiding jury harassment that this Court has identified, *see Warger*, 135 S. Ct. at 528, courts would face a number of difficult questions under Petitioner's claimed exception, and the result would be a substantial erosion of the longstanding no-impeachment rule. These include questions of proof, such as whether complaining jurors are to give live testimony, whether they can be cross-examined, what exactly must be proven to justify a new trial, and what the appropriate standard of proof would be. Petitioner's requested holding would also raise questions about whether and how the opposing party would be able to

---

[7] In his state court appeal, Petitioner advocated for exceptions to the no-impeachment rule for many forms of bias, stating that "[t]he term prejudice will be used interchangeably for the phrase 'evidence of racial, ethnic, religious or gender bias'" and that "while religious bias is not at issue in this case, all recognizable classes under the Equal Protection claims (such as religion) should be part of this Court's analysis." *People v. Peña-Rodriguez*, 11CA0034, Op. Br., p. 30 n.5.

rebut the evidence. For example, could the opposing party subpoena other jurors to test the claim of biased statements and whether those statements influenced deliberations? Could character witnesses or other external evidence be admitted to show that the juror in question is not in fact biased? These and other problems highlight why Petitioner's requested holding—which would open the door to effectively invalidating no-impeachment rules in cases of claimed juror bias—was properly rejected and is not constitutionally required.

***

This Court noted in *Tanner* that although "[t]here is little doubt that postverdict investigation into juror misconduct would in some instances lead to the invalidation of verdicts reached after irresponsible or improper juror behavior[,] ... [i]t is not at all clear ... that the jury system could survive such efforts to perfect it." 483 U.S. at 120. *Tanner* and *Warger* struck the proper balance, and the Colorado Supreme Court correctly concluded that balance should be maintained even to exclude the proffered evidence of racial bias here.

CONCLUSION

The Petition for a writ of certiorari should be denied.

Respectfully submitted,

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MIGUEL ANGEL PEÑA RODRIGUEZ,

Petitioner,

v.

STATE OF COLORADO,

Respondent.

On Petition for a Writ of Certiorari
to the Colorado Supreme Court

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

The State acknowledges that "racial bias is reprehensible and should never be the basis for a verdict." BIO 17. Yet all indications are that is exactly what happened in this case. A bare majority of the Colorado Supreme Court allowed the tainted verdict to stand. And this holding deepens the longstanding conflict over whether no-impeachment rules may bar evidence necessary to expose verdicts infected by racial prejudice.

Despite all of this, the State opposes certiorari. But contrary to the State's arguments, the question presented is ripe for review; this case is an excellent vehicle to resolve the issue; and the Colorado Supreme Court's opinion fails to heed the mandates of the Sixth Amendment. This Court should grant the petition.

I. The Conflict Here Is Unaffected By *Warger v. Shauers*.

The State does not dispute that the federal courts of appeals and state courts of last resort are divided nine-to-three over whether a no-impeachment rule may constitutionally bar evidence of racial bias offered to prove a violation of the Sixth Amendment right to an impartial jury. *See* Pet. 9-16 (detailing this conflict). The State maintains, however, that more percolation is necessary because "[t]he lower courts have not yet had a sufficient opportunity to apply this Court's guidance" in *Warger v. Shauers*, 135 S. Ct. 521 (2014). BIO 10.

The problem with the State's argument is that *Warger* offers no guidance concerning the question presented. In *Warger*, the petitioner and Justice

Kagan expressed concern that enforcing Rule 606(b) across the board to *all* claims of juror bias would unconstitutionally prevent criminal defendants from obtaining relief when racial bias infected jury deliberations. *See* Petr. Br. in *Warger* 39-40; Tr. of Oral Arg. in *Warger* 20, 31-32. But this Court refused to address the question of racial bias, expressly reserving the question whether "[t]here may be cases of juror bias so extreme that, almost by definition, the jury trial right has been abridged." 135 S. Ct. at 529 n.3. The *Warger* Court explained that it "need not consider th[at] question" because "those facts [we]re not presented." *Id.*

When this Court reserves a legal question, it leaves lower court case law on the issue undisturbed. The State nevertheless insists that *Warger* "arguably rejected" the view that defendants have a constitutional right to offer evidence that racial bias infected jury deliberations because the Court "declined to . . . qualify its holding that claims of juror bias do not override the no-impeachment rule." BIO 3, 9-10. But the whole point of the footnote just quoted above was to qualify this holding, refusing to offer a view as to whether it applied to evidence of the most odious form of bias – *racial* bias. Lest there be any doubt, this Court explained in the paragraph to which the footnote is attached that it was holding Rule 606(b) constitutional only "in circumstances such as th[o]se" in *Warger* – that is, when a juror potentially had sympathy for persons who negligently cause car crashes. 135 S. Ct. at 527.

In light of the clear limits the *Warger* Court placed upon its holding, it would be fanciful to suggest that any of the nine lower courts (much less

all nine) that have held the Sixth Amendment demands consideration of evidence offered to prove that racial bias infected jury deliberations would reconsider that view. This is why commentators continue to report that "[t]he Supreme Court has yet to definitively rule on the issue, and a split exists among the federal circuit courts." Jacob J. Key, *Walking the Fine Line of Admissibility: Should Statements of Racial Bias Fall Under an Exception to Federal Rule of Evidence 606(b)?*, 39 Am. J. Trial Advoc. 131, 132 (2015); *see also* 27 Charles Alan Wright & Victor James Gold, Federal Practice & Procedure § 6074, at 513 (2007 & 2015 Supp.) (noting continuing split of authority). "[A] definitive ruling needs to be made by the Supreme Court to ensure all defendants are afforded the same rights and constitutional protections." Key, *supra*, at 161.

II. This Case Is An Excellent Vehicle For Resolving The Split.

Neither of the State's vehicle arguments undercuts the suitability of this case for resolving the conflict over the question presented.

1. The State suggests that "[g]iven the evidence at trial and the defense's presentation of its case, one juror's alleged racial bias could not have altered the outcome." BIO 11. This argument is quite mistaken. The victims never claimed the perpetrator was Hispanic, Tr. 518, and there was no physical evidence linking petitioner or any other Hispanic man to the crime. Tr. 518. At the police-orchestrated show-up and later at trial, the victims identified petitioner as the perpetrator. But petitioner maintained that the stress of the events, the brevity of the encounter, and

suggestions by the police and their father had caused the victims to misidentify him. Pet. 3.

Indeed, as the State notes, petitioner argued *only* that he had been misidentified; "defense counsel did not challenge the evidence" concerning what happened in the bathroom of the racetrack – or that this evidence established *all four* of the offenses the State charged. BIO 5; *see also* Pet. 3-4. Thus, one would have expected the jury to convict on all four counts or none at all. Yet the jury initially hung and ultimately declined to convict petitioner of the State's most serious charge, indicating its verdict was the product of some sort of uncertainty or compromise. Pet. 18; BIO 5-6.

Against this backdrop, there is strong reason to suspect – as all four Colorado judges to consider the question have concluded – that Juror H.C.'s statements in the jury room influenced the outcome. *See* Pet. App. 26a-27a (Márquez, J., joined by Eid & Hood, JJ., dissenting); 65a, 84a-85a (Taubman, J., dissenting). Juror H.C. urged the other jurors to convict petitioner "because he's Mexican" and "Mexican men ha[ve] a bravado that cause[s] them to believe they c[an] do whatever they want[] with women." *Id.* 4a. Juror H.C. also suggested petitioner's alibi witness should be discredited because he was Hispanic and thus necessarily "an illegal." *Id.* 5a. Worse yet, Juror H.C. did not just exhort the other jurors to cast their votes based on these ethnic stereotypes; he purported to ground his racially bigoted contentions in "his experience as an ex-law enforcement officer." *Id.* 4a. Under these circumstances, the notion that Juror H.C.'s urgings

could not have affected the outcome is dubious in the extreme.

At any rate, this Court need not resolve the question of prejudice. The issue here is simply whether a trial court must consider evidence offered to show that racial bias infected jury deliberations. *See* Pet. App. 17a n.1 (Márquez, J., dissenting). If so, then this case should be remanded for that process to go forward. Once the trial court assesses the affidavits petitioner has offered and any other evidence that emerges, it can determine whether petitioner is entitled to a new trial.

2. The State also argues petitioner waived his racial bias claim "by failing to adequately question prospective jurors during voir dire." BIO 15. The Colorado Supreme Court unanimously rejected this contention, Pet. App. 11a n.5, and for good reason: It rests on a misapprehension of petitioner's claim and lacks any support in precedent.

Petitioner's claim is that his Sixth Amendment right to an impartial jury was violated when a juror urged others during deliberations to convict him because he is Hispanic. This claim did not arise until deliberations and does not turn on any alleged error in allowing Juror H.C. to sit on the jury. It thus makes no sense to suggest that petitioner somehow waived his claim by failing to ask any particular questions at voir dire – long before his claim even existed. Failing to object to a person's presence on the jury, in other words, cannot waive a defendant's ability to press a later-arising Sixth Amendment claim based on bias expressed during deliberations.

On-point precedent supports this reasoning, and none lends any support to the State's contrary view.

In *United States v. Villar*, 586 F.3d 76 (1st Cir. 2009), for example, "neither party requested the court to ask the potential jurors voir dire questions regarding bias based upon race or ethnicity." *Id.* at 79. Yet the First Circuit held the defendant had a right to press the same constitutional claim petitioner presses here, explaining that "many defense attorneys have sound tactical reasons for not proposing specific voir dire questions regarding racial or ethnic bias." *Id.* at 87 n.5; *accord Kittle v. United States*, 65 A.3d 1144, 1155 (D.C. 2013).

By contrast, none of the cases the State cites at BIO 14 & n.5 involve the claim petitioner makes. In those cases, defendants argued that trial courts had erred in allowing particular venire members to sit on the jury. Such claims can be waived by failing to register contemporaneous objections or to ask certain questions during voir dire. But neither law nor logic supports extending those unremarkable holdings to the situation here, where the defendant's claim does not argue that the trial court should have struck any venire members from the jury pool.

Finally, even if defendants were required to preserve their right during voir dire to make later-arising claims regarding bias during jury deliberations, petitioner would have adequately discharged that duty. During voir dire, petitioner repeatedly asked the prospective jurors whether they could be "fair" and "render a verdict solely on the evidence presented," and whether they had any inherent feelings against him. Pet. App. 3a; Tr. 319. No court has ever held that such questions are insufficient to require a prospective juror to disclose racial bias.

III. The Colorado Supreme Court's Decision Is Incorrect.

In light of the vital need to establish uniformity in the lower courts regarding the question presented, the State's arguments on the merits do not supply a valid reason to deny certiorari. But the State's arguments are unconvincing even on their own terms.

1. The State cites a few cases supposedly showing the factors laid out in *Tanner v. United States*, 483 U.S. 107 (1987), "can appropriately be applied in cases of alleged racial bias." BIO 16-17. None of the State's cases, however, even involved racial bias. That the State, when challenged, could not come up with any case in which the *Tanner* factors might have adequately safeguarded the Sixth Amendment right to a jury uninfected by racial bias confirms petitioner's and amici's point: Those factors are not up to the task. *See* Pet. 21-24; Br. of Law Professors 10-13; Br. of NACDL 16-17.

2. The State next asserts that racial bias is not qualitatively different from other forms of bias to which no-impeachment rules unquestionably apply. BIO 17. But, as petitioner has explained, the text of the Constitution, as well as this Court's cases, establish the opposite: Racial bias is an exceptionally pernicious form of bias and thus often demands constitutional inquiries that other forms of bias do not. Pet. 24-25, 27-28; Br. of NAACP Legal Defense & Educ. Fund 6-10; *see also Parents Involved in Community Schs. v. Seattle Sch. Dist. No. 1*,. 551 U.S. 701, 795 (2007) (Kennedy, J., concurring in part and concurring in the judgment) ("Reduction of an individual to an assigned racial identity for

differential treatment is among the most pernicious actions our government can undertake."); *id.* at 748, 772-82 (2007) (Thomas, J., concurring) (describing Constitution's special prohibition against "mak[ing] decisions on the basis of race"). The State offers no answer.

3. The State lastly contends that implementing a rule requiring courts to evaluate whether racial bias infected jury deliberations would be so difficult that courts must forgo such inquiries entirely. BIO 18-19. But jurisdictions that already follow the majority rule have not experienced significant problems. Pet. 26-27. Groups of law professors, former judges, and other experts stress this reality, explaining at length how various jurisdictions sensibly and ably administer the rule petitioner seeks. *See* Br. of Law Professors 13-20; Br. of Retired Judges 6-7; Br. of Ctr. on Admin. of Crim. Law 10-12, 23-29. Once again, the State offers no response.

The State's silence should not be surprising. Every quandary the State imagines, if legitimately problematic, would apply not only to claims of racial bias, but also to claims that improper factors already exempted from no-impeachment rules – such "extraneous prejudicial information" or an "outside influence," Fed. R. Evid. 606(b) – influenced jury deliberations.

The State, for instance, professes uncertainty over how courts should take jurors' testimony concerning racial bias; what the appropriate standard of proof should be; and whether an allegedly biased juror's subjective beliefs should be relevant. BIO 18-19. Yet "[t]his Court has long held that the remedy for allegations of juror partiality" in contexts

exempted from impeachment rules is a "post-trial hearing" "in which the defendant has the opportunity to prove actual bias" and the court "determine[s] the effect of such [prejudicial] occurrences when they happen." *Smith v. Phillips*, 455 U.S. 209, 215-17 & n.7 (1982). And a healthy body of case law fills in the procedural details. *See* Br. of Law Professors 16-17; Christopher B. Mueller & Laird C. Kirkpatrick, Federal Evidence § 6:23, at 121 (4th ed. 2013) ("Procedural issues – Interviewing jurors; motions; hearings; burden of proof"). So administering the majority rule concerning the influence of racial bias on deliberations would not require the Colorado courts or any other jurisdiction currently resisting that rule to develop any new procedural protocols. It would just require them to deliver simple justice.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

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IN THE

Supreme Court of the United States

MIGUEL ANGEL PEÑA RODRIGUEZ,

Petitioner,

v.

STATE OF COLORADO,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COLORADO SUPREME COURT

AMICUS CURIAE BRIEF OF CENTER ON THE ADMINISTRATION OF CRIMINAL LAW IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Federal and state courts often inquire into the validity of jury verdicts—including inquiries into the possibility of juror misconduct—to ensure compliance with the Sixth Amendment right to trial by an impartial jury However, most states and the federal system have a rule of evidence that generally prohibits the introduction of juror testimony regarding statements made during deliberations. These principles are known as "no-impeachment rules." No-impeachment rules are codified as Federal Rule of Evidence 606(b) and its state analogues; in some states, such rules exist as common-law principles.

In Amicus's view, the question presented is whether an exception to no-impeachment rules should exist for those narrow circumstances where a defendant offers evidence of racial bias to prove a violation of the Sixth Amendment right to an impartial jury.

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The Center on the Administration of Criminal Law (the "Center") respectfully submits this amicus curiae brief in support of Petitioner in this case.[1]

INTEREST OF *AMICUS CURIAE*

The Center, based at New York University School of Law,[2] is dedicated to defining and promoting good government practices in the criminal-justice system through academic research, litigation, and formulating public policy. One of the Center's guiding principles in selecting cases to litigate is identifying cases that raise substantial legal issues regarding interpreting the Constitution, statutes, regulations, or policies. The Center supports challenges to practices that raise fundamental questions of defendants' rights or that the Center believes constitute a misuse of government resources in view of law-enforcement priorities. The Center also defends criminal justice practices where discretionary decisions align with applicable law and standard practic-

---

[1] Counsel for all parties received notice of Amicus's intent to file this brief and have consented to its filing. No counsel to any party authored this brief in whole or in part, and no person or entity other than Amicus and its counsel made a monetary contribution intended to fund the preparation or submission of this brief.

[2] No part of this brief purports to represent the views of New York University School of Law, or New York University, if any.

es and are consistent with law-enforcement priorities.

The Center's appearance as amicus curiae in this case is prompted by its belief that the Sixth Amendment right to trial by an impartial jury requires that an exception be made to no-impeachment rules for cases in which defendants offer evidence of racial bias during jury deliberations. The Center believes that protecting defendants' Sixth Amendment rights is necessary for the fair and effective administration of criminal justice. This case, therefore, is important to the Center's mission.

SUMMARY OF ARGUMENT

A rule permitting the impeachment of jury verdicts where racial bias is expressed during deliberations would substantially enhance the administration of criminal justice. This amicus brief demonstrates that rooting out racial bias in jury deliberations would not impose significant practical burdens on the courts. To the extent that such a burden may exist, it is greatly outweighed by the importance both of eradicating racial bias from the justice system and enhancing the appearance of justice in this critical respect.

In order to ensure compliance with the Sixth Amendment's requirement of trial by an impartial jury, federal and state courts already inquire into the

validity of jury verdicts and deliberations on multiple grounds. There is no practical reason why consideration of racial bias should not be included among the issues affecting impartiality that courts address—issues that are less pernicious than racial bias.

Indeed, some 19 jurisdictions in regions throughout the country expressly provide for an exception[3] to the no-impeachment rules codified in Federal Rule of Evidence 606(b) and in state analogues.[4] This fact alone demonstrates the practicali-

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[3] Some jurisdictions base the exception on the Sixth Amendment. *See, e.g., United States v. Villar*, 586 F.3d 76 (1st Cir. 2009) ("While we agree with the trial court that Rule 606(b) precludes inquiry into juror prejudice, we hold that the court has the discretion to conduct such an inquiry under the Sixth Amendment and the Due Process Clause ."). Others apply principles of state law. *See, e.g., State v. Santiago*, 715 A.2d 1, 22 (Conn. 1998) (mandating consideration of racial bias "in the exercise of our inherent supervisory authority over the administration of justice").

[4] Rule 606(b) of the Federal Rules of Evidence provides:

> During an Inquiry Into the Validity of a Verdict or Indictment.
>
> (1) Prohibited Testimony or Other Evidence. During an inquiry into the validity of a verdict or indictment, a juror may not testify about any statement made or incident that occurred during the jury's deliberations; the effect of anything on that juror's or another juror's vote; or any juror's mental processes concerning the verdict or indictment. The court may not receive a juror's affidavit or evidence of a juror's statement on these matters.
>
> (2) Exceptions. A juror may testify about whether:
>
> (A) extraneous prejudicial information was improperly brought to the jury's attention;

ty of an exception. In those 19 jurisdictions, furthermore, courts have developed protocols to ensure the sound administration of trials and to limit slippery-slope problems that might ensue from inquiry into jury deliberations. Experience in other areas of the law also confirms that courts are well-equipped to address and decide issues of racial bias.

Not only does an exception for racial bias fit easily into the already routine regime of post-verdict inquiries into pernicious or improper juror influences, but a review of the case law in jurisdictions where the inquiry is permitted shows that racial bias arises infrequently—some 30 times over several decades. *See infra* Point II.C and Appendix A. At the same time, however, courts that have addressed allegations of racial bias have called the jury verdict into question over half the time—a fact that demonstrates the importance of recognizing an exception in order to expunge racial bias that would have gone unexposed were it not for this exception.

The practicality of an exception for racial bias should be dispositive. It is axiomatic that racial bias has no place within the criminal-justice system. For that reason, the courts, including this Court, have

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(B) an outside influence was improperly brought to bear on any juror; or

(C) a mistake was made in entering the verdict on the verdict form.

Fed. R. Evid. 606(b). Most states have analogous rules, either codified or common-law.

crafted rules and doctrines to protect defendants from racial bias. Here, where a no-impeachment exception does not pose significant practical difficulties to the justice system, the pernicious influence of racial bias compels the adoption of such an exception.

ARGUMENT

I. THE SIXTH AMENDMENT REQUIRES AN EXCEPTION TO NO-IMPEACHMENT RULES FOR RACIAL BIAS TO ENSURE THE FAIR, CONSISTENT AND EFFECTIVE ADMINISTRATION OF CRIMINAL JUSTICE

The Sixth Amendment compels adoption of an exception to no-impeachment rules in order to ensure that racial discrimination is excluded consistently from the entire jury process in criminal cases. As this Court has long recognized, racial bias affecting the impartiality of a jury is especially harmful to the integrity of the justice system. As a consequence, this Court has crafted mechanisms to exclude racial considerations from almost every stage of the criminal process. The exception is juror deliberations where, in many jurisdictions, no-impeachment rules preclude even considering whether racial bias affected the impartiality of jury deliberations.

This Court has permitted post-trial inquiry and reversed jury verdicts to ensure that the jury was not influenced by evils far less pernicious than racial bias. Given the Sixth Amendment's command of impartiality, this highlights the incongruence of rooting out racial bias from every stage of the criminal process except what is arguably the most crucial one.

A. The Right to an Impartial Jury Is Fundamental to the Fair Administration of Criminal Justice

The Sixth Amendment right to trial by jury is "the most priceless" of safeguards for the preservation of individual liberty and dignity in the American criminal-justice system. *Irvin v. Dowd*, 366 U.S. 717, 721 (1961). In 1765, the First Congress of the American Colonies described trial by jury as an "inherent and invaluable right," *Duncan v. Louisiana*, 391 U.S. 145, 152 (1968); in 1774, the First Continental Congress called it a "great and inestimable privilege," *id.*; and, in 1776, the Declaration of Independence bemoaned that King George III had "depriv[ed] us in many cases, of the benefits of Trial by Jury," THE DECLARATION OF INDEPENDENCE para. 20 (U.S. 1776).

The right guaranteed by the Sixth Amendment is the right to "a fair trial by a panel of impartial, 'indifferent' jurors." *Irvin*, 366 U.S. at 722. The

failure to accord this right to a defendant "violates even the minimal standards of due process." *Id.* As Chief Justice Marshall recognized in 1807, "'those strong and deep impressions which close the mind against the testimony that may be offered in opposition to them, which will combat that testimony and resist its force, do constitute a sufficient objection'" to a juror. *Reynolds v. United States*, 98 U.S. 145, 155 (1878) (quoting 1 Burr's Trial, 416 (1807)).

Biased jurors undermine a central purpose of the jury system: "to impress upon the criminal defendant and the community as a whole that a verdict of conviction or acquittal is given in accordance with the law by persons who are fair." *Powers v. Ohio*, 499 U.S. 400, 413 (1991) (any criminal defendant may object to race-based peremptory challenges, regardless of the defendant's or excluded juror's race).

B. Because Racial Bias Uniquely Harms the Integrity of Jury Verdicts, It Must Be Excluded from Every Stage of the Criminal Trial

Racial bias impairs both the integrity and reliability of the jury system, in violation of the Sixth Amendment. This Court has implemented mechanisms designed to eliminate racial bias in almost every aspect of the criminal justice system, including where required under the Sixth Amendment. For

example, this Court has permitted objections to the use of peremptory challenges based on race, allowed questions at voir dire to probe racial bias, and held that discrimination in grand jury selection may require setting aside a conviction. *See* Pet. 16-17.

As a consequence of rules such as these, courts strive to expunge racial discrimination from the arrest, indictment, and juror selection stages of criminal trials. Anomalously, however, no-impeachment rules preclude inquiry into racial bias during juror deliberations, which are arguably the most important stage of trial by jury. An exception to no-impeachment rules is necessary to ensure the uniform exclusion of racial bias from the entire criminal justice process.

"Discrimination on the basis of race, odious in all aspects, is especially pernicious in the administration of justice." *Rose v. Mitchell*, 443 U.S. 545, 555 (1979). In fact, "[n]o surer way could be devised to bring the processes of justice into disrepute" than to "permit it to be thought that persons entertaining a disqualifying prejudice were allowed to serve as jurors." *Albridge v. United States*, 283 U.S. 308, 315 (1931).

Racial discrimination undermines the institution of the jury by undercutting the democratic ideals that the jury represents:

> "[S]uch discrimination 'not only violates our Constitution and the laws enacted

> under it but is at war with our basic concepts of a democratic society and a representative government.' The harm is not only to the accused . It is to society as a whole. 'The injury is not limited to the defendant—there is injury to the jury system, to the law as an institution, to the community at large, and to the democratic ideal reflected in the processes of our courts.'"

Rose, 443 U.S. at 556 (citations omitted).

Racial discrimination also impairs the accuracy of jury verdicts. "It is by now clear that conscious and unconscious racism can affect the way white jurors perceive minority defendants and the facts presented at their trials, perhaps determining the verdict of guilt or innocence." *Georgia v. McCollum*, 505 U.S. 42, 68 (1992).

The "pernicious" effect of racial bias among jurors, in conjunction with the Sixth Amendment, requires that courts root out such bias no matter when or where they discover it, whether at the stage of jury selection—*see, e.g.*, *Turner v. Murray*, 476 U.S. 28, 33 (1986) (defendant was entitled to questioning of potential jurors concerning racial prejudice); *Rose*, 443 U.S. at 555-56; *Albridge*, 283 U.S. at 314-15—or at the stage of jury deliberations. An exception to no-impeachment rules will ensure consistent treat-

ment of racial bias across the entire criminal process, from arrest through jury decision-making.

II. AN EXCEPTION TO NO-IMPEACHMENT RULES FOR RACIAL BIAS WILL NOT IMPAIR ADMINISTRATION OF CRIMINAL JUSTICE

The majority of federal appellate courts and state courts of last resort that have considered the interplay between no-impeachment rules and the right to an impartial jury have held that courts may inquire into alleged racial bias in jury deliberations. The experience of these jurisdictions, especially when considered in light of the inquiries into juror deliberations already permitted, shows that such an exception for racial bias is entirely feasible.

A. Federal and State Courts Already Routinely Inquire into Jury Deliberations, Including for Juror Misconduct

Federal and state courts already inquire into the possibility of juror misconduct in order to ensure compliance with the Sixth Amendment. As a consequence, a Sixth Amendment exception to no-impeachment rules for racial bias would not open up broad new avenues for inquiry. Rather, all that is

required is a limited extension of existing grounds for inquiries—albeit an extension critical to ensuring the fundamental fairness of all jury trials.

Rule 33(a), Fed. R. Crim. P. broadly provides: "Upon the defendant's motion, the court may vacate any judgment and grant a new trial if the interest of justice so requires." State rules are similarly flexible. *See, e.g.*, Colo. R. Crim. P. 33(a) (Colorado equivalent of federal rule).

As to juror misconduct, "[t]his Court has long held that the remedy for allegations of juror partiality is a hearing in which the defendant has the opportunity to prove actual bias." *Smith v. Phillips*, 455 U.S. 209, 215 (1982). Thus, in all jurisdictions, upon a proper initial showing by the defendant, courts must hold proceedings to determine if the jury "decide[d] the case solely on the evidence before it," to ensure that there were no "prejudicial occurrences," and to "determine the effect of such occurrences when they happen." *Id.* at 217. Courts maintain the flexibility and discretion to fashion these inquiries according to the needs of the situation: "[I]n light of the infinite variety of situations in which juror misconduct might be discerned and the need to protect jurors and the jury process from undue imposition, the trial judge is vested with the discretion to fashion an appropriate and responsible procedure to determine whether misconduct actually occurred and whether it was prejudicial." *United States v. Ortiz-*

Arrigoitia, 996 F.2d 436, 443 (1st Cir. 1993). Similarly, in Connecticut, for example, "a trial court must conduct a preliminary inquiry, on the record, whenever it is presented with any allegations of jury misconduct in a criminal case." *State v. Brown*, 668 A.2d 1288, 1303 (Conn. 1995).

Federal and state no-impeachment rules are an evidentiary limitation on this general requirement of inquiry into juror misconduct. Federal Rule of Evidence 606(b) and its state equivalents prohibit jurors from testifying on certain topics, such as "any statement made or incident that occurred during the jury's deliberations." As discussed below, however, this evidentiary limitation itself has several exceptions.

By recognizing a racial bias exception to Rule 606(b), therefore, the Court would not be creating a new kind of hearing or procedure. Rather, a racial bias exception would modify the scope of the inquiries that already exist in all jurisdictions. The courts are well-equipped to handle such an evidentiary change in the scope of post-verdict hearings.

B. Rule 606(b) Has Exceptions For Less Odious Juror Influences than Racial Discrimination

Although, as discussed in Point I above, racial bias has a particularly destructive effect on the fair-

ness and reliability of the jury system, Rule 606(b)'s evidentiary limitation has exceptions for juror influences that do not have the same "pernicious" effect on jury impartiality.

Under Rule 606(b) and similar common-law principles, notwithstanding the general prohibition on post-verdict testimony concerning juror deliberations and mental processes, a juror may testify about whether "extraneous prejudicial information was improperly brought to the jury's attention," or about whether "an outside influence was improperly brought to bear on any juror." Fed. R. Evid. 606(b)(2); *see Tanner v. United States*, 483 U.S. 107, 117 (1987) (providing examples of evidence, in categories described below, which may be admitted notwithstanding Rule 606(b)'s broadly prohibitory language).

Of particular interest here, courts have reversed convictions based on biases or prejudices formed through external information other than the evidence presented at trial. For example, a juror's use in deliberations of personal knowledge concerning a defendant may require reversal of a conviction or a hearing into whether reversal is required. *See, e.g., United States v. Howard*, 506 F.2d 865, 866 (5th Cir. 1975) ("during the jury's deliberations one juror 'stated that the defendant had been in trouble two or three times'"; "this fact was used to pressure the affiant and another juror into aligning with the rest of

the panel"); *United States ex rel. Owen v. McMann*, 435 F.2d 813, 815 (2d Cir. 1970) (jurors "informed the other jurors that they 'knew all about' [the defendant] and referred to unfavorable incidents in [the defendant's] life which were entirely unrelated to the charge").

Although less "pernicious" than racial bias, the concern in these cases is starkly similar to the concern in this case. In the personal-knowledge cases, a juror attributed criminal acts to the defendant based on purported facts not admissible at trial. The same is true here. *See* Pet. App. 4a (juror stated that "in his experience as an ex-law enforcement officer, Mexican men had a bravado that caused them to believe they could do whatever they wanted with women"). The only difference is that the bias in *Howard* and *Owen* was the result of a juror's outside personal knowledge concerning the defendant, whereas the bias in this case was the result of racial prejudice. Even if this distinction were material, it cuts in favor of permitting inquiry into racial bias, both because (i) personal knowledge at least may be accurate, and (ii) racial prejudice more greatly affects societal perceptions of fairness in the criminal-justice system.

Additionally, courts recognize the prejudicial effect that can arise from unauthorized communication by or to jurors, and reverse jury verdicts accordingly. Courts inquire into such situations even where the juror himself or herself has not made any

statements or taken any overt action; the possible prejudicial effect of such statements on a juror who has heard them is enough to require an inquiry. *See, e.g., Parker v. Gladden*, 385 U.S. 363, 363-64 (1966) (a court bailiff commented to a juror, "Oh that wicked fellow [the defendant], he is guilty," and said that if the jury erred "the Supreme Court will correct it"); *Mattox v. United States*, 146 U.S. 140, 142 (1892) (a court bailiff said to jurors, "This is the third fellow [the defendant] has killed").

By contrast, in three jurisdictions that have considered the issue, including the Colorado Supreme Court in the decision below, no comparable inquiry into racial bias is permissible. *See, e.g.*, Pet. App. 5a ("The trial court denied the motion, finding that CRE 606(b) barred any inquiry into H.C.'s alleged bias during deliberations.").

Along the same lines, evidence of attempts to bribe jurors may require reversal, even where attempts were clearly unsuccessful (*i.e.*, conviction occurred), because of possible prejudice arising from the bribe attempt itself. For example, in *Remmer v. United States*, this Court directed the district court to hold a hearing into allegations of juror bribery, although an FBI investigation concluded that there had been no wrongdoing and the attempt had been made "in jest." 347 U.S. 227, 228-29 (1954) (explaining that the FBI investigation itself could have influenced and prejudiced the jury); *see Stimack v. Texas*,

548 F.2d 588, 588 (5th Cir. 1977) (jurors testified that they viewed defendants "more severely" after they received phone calls threatening retributive action by the Mafia if the jury did not acquit the defendant).

Furthermore, courts reverse convictions in situations involving communications that appear less harmful than threats or bribery. In the case of government actors, "even seemingly innocuous juror conversations and contact between such individuals and a juror can trigger a presumption of prejudice." *United States v. Rutherford*, 371 F.3d 634, 643 (9th Cir. 2004); *see Turner v. Louisiana*, 379 U.S. 466, 468-70 (1965) (deputy sheriffs who testified for prosecution also drove jurors and spent social time with them); *United States v. Caldwell*, 83 F.3d 954, 956 (8th Cir. 1996) (jurors witnessed another juror's husband enter the jury room during breaks; "third-party communications regarding the substance of the trial are presumptively prejudicial and can constitute grounds for a new trial unless the government establishes that the contact was harmless to the defendant"); *Little v. United States*, 73 F.2d 861, 867 (10th Cir. 1934) (stenographer who reread jury instructions in the jury room may have influenced deliberations through misinterpretation or use of emphasis).

If courts may permissibly inquire into whether a stenographer's inadvertent use of emphasis could bias a jury so severely as to warrant overturn-

ing a conviction, there can be no doubt that they must inquire into the far more troubling circumstances of racial bias. These examples show that courts are fully capable of investigating potential juror bias following a verdict without disrupting the system of juror deliberations.

Courts also have reversed convictions where jurors have had entirely accidental access to outside information, in circumstances that suggest no inherent bias on the jurors' part. *See, e.g., Gov't of Virgin Islands v. Joseph*, 685 F.2d 857, 862-65 (3d Cir. 1982) (two documents not in evidence were inadvertently sent to the jury); *United States v. Vasquez*, 597 F.2d 192, 193 (9th Cir. 1979) (jurors examined case file accidentally left in jury room); *Farese v. United States*, 428 F.2d 178, 179-81 (5th Cir. 1970) (jurors found $750 cash, about which the court and parties were unaware, in an attaché case during jury's examination of evidence). Again, given the unique evil of racial bias, it is anomalous to allow post-conviction inquiries into innocent mistakes, but not to allow an inquiry into racial bias in jury deliberations.

It makes no sense to prohibit the introduction of evidence showing overt racial bias by jurors. Racial prejudice is uniquely "pernicious" to the justice system, and demonstrates an obvious and overt lack of the Constitutionally guaranteed impartiality. In the situations discussed above, courts have proven their facility at entertaining evidence concerning ju-

ry deliberations without disrupting the criminal justice system, and even the mere possibility of bias arising from an external influence on the jury is enough to reverse a conviction.

C. In Jurisdictions that Consider Racial Bias, Such Allegations Are Infrequent, But Often Lead to Reversal

The experience of 19 jurisdictions that expressly allow consideration of jury-room racial bias confirms both that consideration of racial bias in jury deliberations is practical and that it is crucial to protecting Sixth Amendment rights. In those jurisdictions, allegations of racial bias among jurors arise relatively rarely, confirming the rule's practicality. When they do arise, however, courts have reversed for a new trial or called for further inquiry in over half of the cases, confirming the rule's importance. Together, this experience demonstrates that consideration of racial bias does not unduly consume judicial resources or impair the administration of trials, but that the rule serves an important function in rooting out racial bias.

To reach these conclusions, Amicus analyzed the case law in jurisdictions that approve of courts' consideration of racial bias in jury deliberations notwithstanding no-impeachment rules. Amicus (*i*) identified in each such jurisdiction the leading case that established the principle that courts may inquire into racial bias in deliberations; (*ii*) analyzed the cases that were indicated on Westlaw as "citing" the leading case, and (*iii*) identified whether such judicial review resulted in affirmance or reversal of the challenged verdict due to alleged racial bias.[5]

The following chart summarizes the results:

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[5] An explanation of the methodology used by Amicus and its case-by-case results are shown in the chart annexed as Appendix A. This analysis may have missed some cases that are unreported or unavailable on Westlaw or otherwise were not identified by Amicus's methodology. Thus, the chart is suggestive rather than definitive. Nonetheless, the research provides a general basis for understanding the frequency with which racial bias in deliberations arises and leads to reversal.

	Date of First Case Allowing Racial Bias Challenge	Number of Cases Addressing Inquiry into Racial Bias in Jury Deliberations	New Trial or Hearing Granted	No New Trial
First Circuit[6]	2009	2	2	0
Seventh Circuit[6]	1987	1	0	1
Connecticut	1998	6	3	3
Delaware	1996	1	1	0
District of Columbia	2013	1	0	1
Florida	1995	3	3	0
Georgia	1990	1	0	1
Hawaii	1996	1	0	1
Massachusetts	2010	2	1	1
Minnesota	1980	2	1	1
Missouri	2010	1 (ethnic or religious bias)	1 (ethnic or religious bias)	0
New Jersey	1961	1 (religious bias)	1 (religious bias)	0
New York	1986	3	2	1
North Dakota	2008	1	0	1
Oklahoma	2012	1	1	0

[6] Including federal district courts within the Circuit.

	Date of First Case Allowing Racial Bias Challenge	Number of Cases Addressing Inquiry into Racial Bias in Jury Deliberations	New Trial or Hearing Granted	No New Trial
Oregon	1981	N/A[7]	N/A	N/A
Rhode Island	2013	1	0	1
South Carolina	1995	1	0	1
Washington	1967	1	0	1
Total		**30**	**16**	**14**

The rarity of allegations of bias confirms the practicality of Petitioner's proposed rule. Amicus's review of these 19 jurisdictions over several decades showed 30 instances in which courts addressed inquiries into allegations of racial bias (in two jurisdictions, ethnic or religious bias) during jury deliberations. This shows that the availability of a remedy for bias during deliberations has not opened the floodgates or overwhelmed the courts. There is no reason to believe that the experience of these 19 jurisdictions would not be reflected nationwide.

At the same time, the frequency with which a new trial or hearing was ordered demonstrates the importance of recognizing a Sixth Amendment excep-

[7] Although an Oregon statute establishes a racial bias exception, no cases were identified which applied it.

tion to no-impeachment rules. In over half of the cases in which courts considered allegations of racial bias in jury deliberations—16 of 30 cases reviewed by Amicus—courts have required new trials or inquiries into the allegations.

With a low systemic cost to the courts as a whole and a high individual value in the specific cases in which it arises, consideration of racial bias in jury deliberations is a paradigmatic example of a beneficial rule. In the jurisdictions that have already adopted it, the exception not only serves to root out racial bias in individual cases, but it carries enormous symbolic importance as a normative statement that the courts will not countenance the type of horrific racial bias that may be revealed. *See, e.g.*, *Kittle v. United States*, 65 A.3d 1144, 1147-48, 1155 (D.C. 2013) (where certain jurors reportedly suggested "that all 'blacks' are guilty," the trial judge had discretion to consider juror testimony to ensure "the public's confidence in the fair administration of justice" and because of the "insidiousness of racial or ethnic bias"). And even if the court concludes that reversal is not warranted, the thoughtful and deliberate consideration of potential racial bias strongly validates the judicial process. The small burden on the courts is thus outweighed both in individual cases and systemically.

D. Courts Are Well-Equipped to Make Judgments Concerning Alleged Racial Bias in Jury Deliberations

The experience of the 19 jurisdictions that allow inquiry into racial bias in jury deliberations demonstrates the error of the Colorado Supreme Court's view that it would be unable to "discern a dividing line between different *types* of juror bias" or between racially biased comments of varying "severity." Pet. App. 14a-15a (emphasis in original). The Colorado Supreme Court was wrong for at least three reasons.

First, courts frequently draw precisely that dividing line regarding racial bias in multiple contexts other than jury deliberations.

For example, when faced with *Batson* challenges to prosecutors' use of peremptory challenges, courts are required to conduct "a sensitive inquiry into such circumstantial and direct evidence of intent as may be available" in determining whether prosecutors' use of challenges was proper or whether prosecutors acted with "discriminatory purpose." *Batson v. Kentucky*, 476 U.S. 79, 93-94 (1986). As part of this inquiry, courts must look carefully at "all relevant circumstances," including prosecutors' questions and statements during voir dire and any pattern of strikes against jurors of a particular race. *Id.* at 96-97. Indeed, determining a prosecutor's true

motive may well be a more difficult judgment than discerning unlawful bias in actual spoken comments made by deliberating jurors.

Similarly, during voir dire, courts are entitled to ask questions about racial bias, and must decide whether to excuse jurors for cause based on their responses, as well as any other comments they may make about race. Under the circumstances of a particular case, it may even be an abuse of discretion to fail to ask questions regarding such bias. *See, e.g.*, *Rosales-Lopez v. United States*, 451 U.S. 182, 192 (1981) ("federal trial courts must make such an inquiry when requested by a defendant accused of a violent crime and where the defendant and the victim are members of different racial or ethnic groups"); *Ham v. South Carolina*, 409 U.S. 524, 527 (1973) ("we think that the Fourteenth Amendment required the judge in this case to interrogate the jurors upon the subject of racial prejudice"). These principles recognize that trial courts are well-equipped to determine whether jurors' responses to such questions require their removal for cause. *See Rosales-Lopez*, 451 U.S. at 189 ("Because the obligation to impanel an impartial jury lies in the first instance with the trial judge, and because he must rely largely on his immediate perceptions, federal judges have been accorded ample discretion in determining how best to conduct the voir dire.").

In an analogous context, in determining the motives underlying employment decisions, courts often distinguish between evidence of true racial animus and "stray" racial comments. "Whereas direct evidence of animus relates to the actor's state of mind at the time of making an adverse decision, a stray remark is simply a prejudicial comment that does not bear upon the challenged employment decision." MARK A. ROTHSTEIN ET AL., EMPLOYMENT LAW § 2.7 (5th ed. 2014). A "stray remark" may be identified, among other means, through its "remoteness in person from the individual plaintiff and in time from the adverse decision." *Id.*

The experience of jurisdictions permitting inquiry into racial bias during jury deliberations confirms that courts are capable of identifying the appropriate "dividing line" in that context as well. In *State v. Johnson*, 951 A.2d 1257, 1279-80 (Conn. 2008), for example, the defendant claimed that racial bias was shown by jurors' comments about certain spectators at the trial. The appellate court engaged in a careful, fact-specific review of the record before concluding that the jurors' descriptions of the spectators fell on the permissible side of the line. *See id.*

Second, in jurisdictions where evidence of racial bias in jury deliberations is considered, courts often employ harmless-error review, *i.e.*, determining whether comments made a difference in the outcome of the trial. Through harmless error review, courts

are able to draw a "dividing line" between comments that require reversal and those do not, which the Colorado Supreme Court claimed was impossible. For example, in *Shillcutt v. Gagnon*, where the defendant was accused of soliciting prostitutes, a juror said, "Let's be logical. He's black and he sees a seventeen year old white girl—I know the type." 827 F.2d 1155, 1156 (7th Cir. 1987). Applying harmless-error review, the court concluded that there was no "substantial probability that the alleged racial slur made a difference in the outcome of the trial." *Id.* at 1159; *see State v. Hidanovic*, 747 N.W.2d 463, 467, 474 (N.D. 2008) (negative discussion of the defendant's ethnicity, including a juror's statement that Bosnians "stole from my business" and "lied to me regarding the theft and their conduct," "would not have affected the verdict of a hypothetical average jury"); *State v. Hunter*, 463 S.E.2d 314, 316 (S.C. 1995) (juror's use of racial slur, in context, did not deny defendant a fair trial); *Spencer v. State*, 398 S.E.2d 179, 185 (Ga. 1990) ("Moreover, assuming the truth of the affidavit, it shows only that two of the twelve jurors possessed some racial prejudice and does not establish that racial prejudice caused those two jurors to vote to convict Spencer and sentence him to die.").

The Colorado Supreme Court gave no reason why harmless-error review is infeasible in this context, given that it is frequently used to evaluate a

host of different challenges to a verdict—ranging from mistaken admission of harmful evidence to prosecutorial misconduct to errors in jury instructions—all of which may require judgment calls equally or more difficult than assessing the impact of openly expressed racial bias.

Third, courts have adopted familiar doctrines, presumptions, and rules—the very same judicial doctrines already used in numerous legal contexts—to help them decide which types of comments may have impermissibly infected the jury's decision-making.

Massachusetts, for example, has adopted a burden-shifting framework:

> The defendant therefore bears the initial burden of proving, by a preponderance of the evidence, that the jury were exposed to statements that infected the deliberative process with racially or ethnically charged language or stereotypes. If the defendant meets this burden, the burden then shifts to the Commonwealth to show beyond a reasonable doubt that the defendant was not prejudiced by the jury's exposure to these statements.

Commonwealth v. McCowen, 939 N.E.2d 735, 766 (Mass. 2010) (citations omitted).

Indeed, *McCowen* stands as an example of a court drawing the dividing line between different cir-

cumstances and expressions of racial bias that the Colorado Supreme Court thought impossible. There, juror affidavits alleged "that another juror (Juror Y) said that bruises like those found on the victim's body would result 'when a big black guy beats up on a small woman.'" *Id.* at 761. After a hearing, the trial judge concluded that in the jury room, "Juror Y's words provoked an immediate reaction from the black female juror, who asked Juror Y what being black had to do with it and called her a racist," and which was followed by a verbal "confrontation." *Id.* at 762. Based on that evidence, the court upheld the trial court's conclusion that the juror's response to Juror Y "served the beneficial purpose of exposing and 'blunting the effect' of the racial stereotype, and of warning the jury of the risk of racial stereotypes infecting their deliberations." *Id.* at 766.

Moreover, as is common practice, appellate courts have given deference to factual determinations on the basis that the trial judge is best situated to determine what affected jury deliberations. *See Hidanovic*, 747 N.W.2d at 474 (applying abuse of discretion review); *State v. Levitt*, 176 A.2d 465, 468-69 (N.J. 1961) ("We cannot overlook the factor that the judge who presided at the trial and the hearing was in a better position than this court, which sees only the cold record, to appraise the entire situation and determine whether the defendant's basic rights were violated."). This doctrine helps alleviate concern that

appellate judges will need to draw lines between factual circumstances based on "cold records."

In sum, courts can effectively evaluate and judge evidence of racial bias in jury deliberations using standard doctrines and procedures. The Colorado Supreme Court's suggestion that such inquiries would be unmanageable fails to pass Constitutional muster.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

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Respectfully submitted,

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APPENDIX

APPENDIX A

In preparing this brief, Amicus reviewed case law in jurisdictions that allow impeachment of jury verdicts on grounds of racial bias expressed during deliberations. In each of the relevant jurisdictions, Amicus identified the leading case that established the principle that courts may consider racial bias in jury deliberations. For each leading case, Amicus then analyzed the cases that were indicated as "citing" the leading case on Westlaw and that contained keywords relating to racial bias. For each such case, Amicus ascertained whether the criminal defendant or petitioner had alleged that racial bias infected the verdict. Amicus then recorded the outcome of each case—whether racial bias was grounds for reversal for a new trial or for a hearing into whether a new trial was necessary, or whether the conviction was affirmed. The 30 cases shown in the chart below met these criteria.[1]

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[1] For purposes of this survey, Amicus did not include three additional jurisdictions that have expressed support for a racial bias exception to the no-impeachment rule without explicitly adopting it. *See* Pet. App. 15 (citing *United States v. Henley*, 238 F.3d 1111, 1121 (9th Cir. 2001); *State v. Shillcutt*, 350 N.W.2d 686 (Wis. 1984)); *see also People v. Allen*, 264 P.3d 336, 348 n.13 (Cal. 2011).

Jurisdictions with Sixth Amendment Exceptions to No-Impeachment Rule

	Case Addressing Inquiry into Racial Bias in Jury Deliberations	New Trial or Hearing Granted	No New Trial
First Circuit	*United States v. Villar*, 586 F.3d 76 (1st Cir. 2009)	X	
First Circuit	*United States v. Fuentes*, No. 2:12-CR-50-DBH, 2013 WL 4483062 (D. Me. Aug. 19, 2013)	X	
Seventh Circuit	*Shillcutt v. Gagnon*, 827 F.2d 1155 (7th Cir. 1987)		X
Delaware	*Fisher v. State*, 690 A.2d 917 (Del. 1996)	X	
District of Columbia	*Kittle v. United States*, 65 A.3d 1144 (D.C. 2013)		X
Georgia	*Spencer v. State*, 398 S.E.2d 179 (Ga. 1990)		X
Massachusetts	*Commonwealth v. McCowen*, 939 N.E.2d 735 (Mass. 2010)		X
Massachusetts	*Commonwealth v. Laguer*, 571 N.E.2d 371 (Mass. 1991)	X	

	Case Addressing Inquiry into Racial Bias in Jury Deliberations	New Trial or Hearing Granted	No New Trial
Missouri	*Fleshner v. Pepose Vision Institute, P.C.*, 304 S.W.3d 81 (Mo. 2010) (ethnic or religious bias)[2]	X	
New Jersey	*State v. Levitt*, 176 A.2d 465 (N.J. 1961) (religious bias)	X	
North Dakota	*State v. Hidanovic*, 747 N.W.2d 463 (N.D. 2008)		X
Rhode Island	*State v. Brown*, 62 A.3d 1099 (R.I. 2013)		X
South Carolina	*State v. Hunter*, 463 S.E.2d 314 (S.C. 1995)		X

[2] Missouri, Connecticut, Florida, and Oklahoma have applied a bias exception to no-impeachment rules in certain civil cases, as well as in criminal cases. The civil cases are relevant here to show the feasibility and usefulness of the exception.

Jurisdictions with Exceptions to No-Impeachment Rule Based on State Statute or Common Law

	Case Addressing Inquiry into Racial Bias in Jury Deliberations	New Trial or Hearing Granted	No New Trial
Connecticut	*State v. Johnson*, 951 A.2d 1257 (Conn. 2008)		X
Connecticut	*State v. Anderson*, 773 A.2d 287 (Conn. 2001)		X
Connecticut	*State v. Santiago*, 715 A.2d 1 (Conn. 1998)	X	
Connecticut	*State v. Phillips*, 927 A.2d 931 (Conn. App. Ct. 2007)	X	
Connecticut	*State v. Bowens*, 773 A.2d 977, 983 (Conn. App. Ct. 2001)		X
Connecticut	*Horan v. Murgio*, No. 538130, 1998 WL 695282 (Conn. Super. Ct. Sept. 23, 1998)	X	
Florida	*Marshall v. State*, 854 So.2d 1235 (Fla. 2003)	X	
Florida	*Powell v. Allstate Ins. Co.*, 652 So.2d 354 (Fla. 1995)	X	
Florida	*Wright v. CTL Distribution, Inc.*, 679 So.2d 1233 (Fla. Dist. Ct. App. 1996)	X	

	Case Addressing Inquiry into Racial Bias in Jury Deliberations	New Trial or Hearing Granted	No New Trial
Hawaii	*State v. Jackson*, 912 P.2d 71 (Haw. 1996)		X
Minnesota	*State v. Bowles*, 530 N.W.2d 521 (Minn. 1995)	X	
Minnesota	*State v. Callender*, 297 N.W.2d 744 (Minn. 1980)		X
New York	*Shung Lam v. Cheng*, 773 N.Y.S.2d 303 (App. Div. 2004)		X
New York	*People v. Rukaj*, 506 N.Y.S.2d 677 (App. Div. 1986)	X	
New York	*People v. Whitmore*, 257 N.Y.S.2d 787 (Sup. Ct. 1965)	X	
Oklahoma	*Fields v. Saunders*, 278 P.3d 577 (Okla. 2012)	X	
Oregon	Or. Rev. Stat. Ann. § 40.335 (1981) (Conference Committee Commentary)	N/A[3]	N/A
Washington	*State v. Hall*, 697 P.2d 597 (Wash. Ct. App. 1985)		X

[3] Although the Oregon statute creates a racial bias exception to the no-impeachment rule, Amicus was able to find no cases applying the statute in this regard.

DEC 10 2015

No. 15-606

IN THE

Supreme Court of the United States

MIGUEL ANGEL PEÑA-RODRIGUEZ,

Petitioner,

v.

STATE OF COLORADO,

Respondent.

On Petition for Writ of Certiorari to the Colorado Supreme Court

BRIEF OF THE NAACP LEGAL DEFENSE & EDUCATIONAL FUND, INC. AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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Strauder v. West Virginia,
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27 Charles A. Wright & Victor J. Gold, *Fed. Prac. & Proc.. Evid.* (2d ed. 2007) 9, 18, 20

Benjamin T. Huebner, *Beyond Tanner: An Alternative Framework for Postverdict Juror Testimony*, 81 N.Y.U. L. Rev. 1469 (2006) 21

Brief of the NAACP Legal Defense and Educational Fund, Inc. as *Amicus Curiae* in Support of Petitioner, *Sterling v. Dretke*, 117 Fed. App'x 328 (5th Cir.) (unpublished), *cert. denied*, 544 U.S. 1053 (2005), 2005 WL 952252 (Apr. 22, 2005) 15-16

Charles Abrams, *Forbidden Neighbors: A Study of Prejudice in Housing* (1955) *in The Suburb Reader* (Becky M. Nicolaides & Andrew Wiese eds., 2006) 16-17

Colin Miller, *Dismissed with Prejudice: Why Application of the Anti-Jury Impeachment Rule to Allegations of Racial, Religious, or Other Bias Violates the Right to Present A Defense*, 61 Baylor L. Rev. 872 (2009) 9

Edward T. Swaine, *Pre-Deliberations Juror Misconduct, Evidential Incompetence, and Juror Responsibility*, 98 Yale L.J. 187 (1988) 20

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Michelle Alexander, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness* (2010) 16

Nicholas S. Bauman, *"Extraneous Prejudicial Information": Remedying Prejudicial Juror Statements Made During Deliberations*, 55 Ariz. L. Rev. 775 (2013) 21

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Stern & Gressman, *Supreme Court Practice* (8th ed. 2002) 10

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INTEREST OF *AMICUS CURIAE* [1]

The NAACP Legal Defense & Educational Fund, Inc. ("LDF") is the nation's first and foremost civil rights law firm. LDF was founded as an arm of the NAACP in 1940 by Charles Hamilton Houston and Thurgood Marshall to redress racial discrimination and to assist African Americans in securing their constitutional and statutory rights. Through litigation, advocacy, public education, and outreach, LDF strives to secure equal justice under the law for all Americans, and to break down barriers that prevent African Americans from realizing their basic civil and human rights.

LDF has long been concerned about the influence of race on the administration of the criminal justice system in particular and with laws, policies, and practices that impose a disproportionate negative impact on communities of color more generally. For example, LDF served as counsel of record for the defendants in cases involving racial bias and the racial make-up of juries, *Swain v. Alabama*, 380 U.S. 202 (1965), *Alexander v. Louisiana*, 405 U.S. 625 (1972), and *Ham v. South Carolina*, 409 U.S. 524 (1973); pioneered the affirmative use of civil actions to end jury discrimination in *Carter v. Jury Commission*, 396 U.S. 320 (1970), and *Turner v. Fouche*, 396 U.S. 346 (1970); and appeared as *amicus*

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[1] Pursuant to Supreme Court Rule 37.2(a), counsel of record for both parties received notice of *amicus curiae*'s intention to file this brief at least 10 days prior to the due date. Petitioner and Respondent have consented to the filing of this brief, and their letters of consent have been filed with the Clerk. No party authored this brief in whole or in part, and no person or entity, other than *amicus curiae*, its members, or its counsel, has made a monetary contribution to the preparation or submission of this brief.

curiae in cases involving the use of race in peremptory challenges in *Johnson v. California*, 543 U.S. 499 (2005), *Miller-El v. Cockrell*, 537 U.S. 322 (2003), *Georgia v. McCollum*, 505 U.S. 42 (1992), *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614 (1991), and *Batson v. Kentucky*, 476 U.S. 79 (1986) (overruling *Swain*). LDF also recently testified before the United States Congress as well as the President's Task Force on 21st Century Policing about the prevalence of racial bias throughout the criminal justice system and the need to eliminate such discrimination in order to foster public confidence and trust in our public institutions.[2]

Given its expertise in matters concerning the influence of race on the criminal justice system, LDF believes its perspective would be helpful to the Court in evaluating the importance of this case and determining whether to grant certiorari.

INTRODUCTION AND SUMMARY OF ARGUMENT

In the criminal proceedings below, Petitioner entered the courthouse "believing that times had changed" and "confident that justice . would be guided by the promise that [he] would be judged

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[2] *See* Testimony of Sherrilyn Ifill to the United States Senate Judiciary Committee, Subcommittee on Oversight, Agency Action, Federal Rights and Federal Courts (Nov. 17, 2015), *available at* http://www.naacpldf.org/document/ldf-testimony-senate-judiciary-committee%E2%80%99s-subcommittee-oversight-agency-action-federal-rig; Statement by the NAACP Legal Defense and Educational Fund, Inc. Before the President's Task Force on 21st Century Policing (Jan. 13, 2015), *available at* http://www.naacpldf.org/document/ldf-testimony-presidents-task-force-21st-century-policing.

not by the color of [his] skin,"[3] but by relevant, objective, and fair measures. Instead, Petitioner was convicted after a trial in which a juror asserted during deliberations that Petitioner was guilty of the crime charged because of his race. Specifically, the juror made several statements urging the jury to convict Petitioner because of his ethnicity, arguing that Petitioner was guilty "because he's Mexican and Mexican men take whatever they want," and referencing the juror's own "experience as an ex-law enforcement officer" where, allegedly, on "patrol, nine times out of ten Mexican men were guilty of being aggressive toward women ." Pet. App. 4a-5a. That same juror also suggested that an alibi witness did not provide credible testimony because of his race.

Even after two other jurors came forward to report the explicit racial bias of their fellow juror, the Colorado Supreme Court held that, notwithstanding the Sixth Amendment's guarantee of an impartial jury, this egregious misconduct was not subject to judicial review. This erroneous ruling not only violates Petitioner's constitutional rights and undermines the integrity of his individual criminal trial, but it also gravely erodes public confidence in our system of justice more broadly. Recent events only confirm the stark and unsettling reality that racial bias and stereotyping remain serious and stubbornly persistent problems that undermine confidence in the criminal justice system.

Amicus curiae, therefore, writes separately at the certiorari stage of this case to emphasize two key reasons why this Court should grant the Petition:

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[3] *Edmonson v. Leesville Concrete Co.*, No. 89-7743, 1991 WL 636291, at *29 (U.S. Oral Arg., Jan. 15, 1991).

First, the problem of racial bias in the jury system is a vitally important issue that merits this Court's intervention. For over a century, this Court has strived to eradicate racial bias from our criminal justice system. Time and again, this Court has treated such discrimination, particularly in the context of the jury, as an exceptional harm deserving of exceptional attention and remedies. Consonant with that history of intervention, the Petition should be granted to resolve an entrenched circuit split and because it implicates an important issue involving the Constitution's special concern for racial prejudice in the jury system. Allowing the Colorado Supreme Court's decision to stand would further undercut public trust in the criminal justice system.

Second, the Colorado Supreme Court fundamentally misconstrued the constitutional significance of racial bias in juries. The Colorado Supreme Court failed to appreciate – or even cite – this Court's longstanding precedents addressing the special harms of racial bias in juries, its jurisprudence about extreme forms of bias like those expressed in this case, or the critical importance of public confidence in the operation of our system of justice. Remarkably, the Colorado Supreme Court equated constitutional protections of an impartial jury with policies animating the rules of evidence, thereby subjugating Sixth Amendment rights to mere policy concerns.

We urge this Court to grant the Petition and to restore the promise of an impartial jury trial free from the taint of racial animus to every defendant, who our Constitution commands be equal in the eyes of the law.

ARGUMENT

The Sixth Amendment guarantees a criminal defendant the right to a trial "by an impartial jury." U.S. Const. Amend. VI.[4] An "impartial jury" is one that is "capable and willing to decide the case solely on the evidence before it," *Smith v. Phillips*, 455 U.S. 209, 217 (1982), and that disregards any personal prejudices or biases. *See, e.g., Powers v. Ohio*, 499 U.S. 400, 411 (1991) (referencing a defendant's "right to be tried by a jury free from ethnic [or] racial prejudice"); *United States v. Maldonado-Rivera*, 922 F.2d 934, 971 (2d Cir. 1990) (jurors must "be able to view the evidence with impartiality and to decide the case without bias"). At the same time, Federal Rule of Evidence 606(b) and its state analogs, such as the one at issue in this case, reflect the general practice that juror testimony is not normally admissible to impeach a jury verdict. The Rule itself recognizes that this practice promotes the "freedom of deliberation," "finality of verdicts," and "protection of jurors against annoyance," Fed. R. Evid. 606 Advisory Committee's Notes. But this so-called "no-impeachment" rule is, of course, still subject to constitutional constraints. This Court should resolve the circuit split over the question of whether the Sixth Amendment requires consideration of juror testimony when racial bias infects jury deliberations.

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[4] The Fourteenth Amendment, which makes the Sixth Amendment applicable to the states, likewise provides a coterminous right to an impartial jury. *See, e.g.*, Pet. 12 n.3. Throughout this brief, we refer to this simply as a Sixth Amendment right.

I. RACIAL BIAS IN THE JURY SYSTEM IS A CRITICALLY IMPORTANT ISSUE THAT WARRANTS INTERVENTION BY THIS COURT.

For over a century, spanning ten Chief Justices, strong majorities of this Court have repeatedly recognized that racial animus in the jury system is antithetical to core constitutional principles and deleterious to the integrity of – and public confidence in – our legal system. Accordingly, this Court has consistently identified jury-related racial bias as an exceptional problem meriting recurrent and decisive interventions.

A. This Court has long approached racial prejudice in the jury system as a uniquely harmful and critical constitutional issue.

This Court has consistently made clear that a criminal conviction cannot stand if it was compromised by racial bias. An "unbroken line of cases," *Rose v. Mitchell*, 443 U.S. 545, 551 (1979), extending "over a century of jurisprudence[,] [has been] dedicated to the elimination of race prejudice within the jury selection process," *Edmonson*, 500 U.S. at 618. "[A] defendant has the right to an impartial jury that can view him without racial animus, which so long has distorted our system of criminal justice." *McCollum*, 505 U.S. at 58. If a jury is to fulfill its duty as a "prized shield against oppression," *Glasser v. United States*, 315 U.S. 60, 84 (1942), and the defendant is to reap the benefit of its "common-sense judgment," *Duncan v. Louisiana*, 391 U.S. 145, 156 (1968), then the jury must remain free from racial bias.

The Court has emphasized that jury-related discrimination is inimical to our judicial system "because it is 'a stimulant to that race prejudice which is an impediment to securing to [Black citizens] that equal justice which the law aims to secure to all others.'" *Batson*, 476 U.S. at 87-88 (quoting *Strauder v. West Virginia*, 100 U.S. 303, 308 (1879)); *see also Rose*, 443 U.S. at 555 ("Discrimination on the basis of race, odious in all aspects, is especially pernicious in the administration of justice."); *id.* at 558-59 (describing modern forms of discrimination as "[p]erhaps . . more subtle" but still seriously injurious). With respect to jury deliberations in particular, "[n]othing would be more pernicious to the jury system than for society to presume that persons of different backgrounds go to the jury room to voice prejudice." *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 154 (1994) (Kennedy, J., concurring in the judgment).

The Court has applied these foundational principles broadly. *See, e.g.*, *Edmonson*, 500 U.S. at 618 (concluding that racial discrimination in the jury system is impermissible in civil, as well as criminal, proceedings); *J.E.B.*, 511 U.S. at 131-42 (extending *Batson* to prohibit discrimination in jury selection on the basis of gender). These expansive protections against discrimination in the jury are rooted in the critical role that juries play in ensuring the fair and impartial administration of justice:

> We do not prohibit racial . . . bias in jury selection only to encourage it in jury deliberations. Once seated, a juror should not give free rein to some racial . bias of his or her own. The jury system is a kind of compact by which power is transferred from the judge to jury, the jury in turn deciding the case in accord

> with the instructions defining the relevant issues for consideration. The wise limitation on the authority of courts to inquire into the reasons underlying a jury's verdict does not mean that a jury ought to disregard the court's instructions. A juror who allows racial . bias to influence assessment of the case breaches the compact and renounces his or her oath.

J.E.B., 511 U.S. at 153 (Kennedy, J., concurring in the judgment); *see also Edmonson*, 500 U.S. at 624 ("The jury exercises the power of the court and of the government that confers the court's jurisdiction.").

The Court's special focus on eradicating racial bias in the jury system is grounded upon a jury's critical role as the last line of defense in ensuring the proper administration of justice. "England, from whom the Western World has largely taken its concepts of individual liberty and of the dignity and worth of every man, has bequeathed to us safeguards for their preservation, the most priceless of which is that of trial by jury." *Irvin v. Dowd*, 366 U.S. 717, 721 (1961); *see also id.* at 722 (noting that the right to an impartial jury requires that a "verdict . be based upon the evidence developed at the trial").

As this Court has repeatedly recognized, juries are the principal means by which to protect our citizenry from the State's potential misuse of its broad powers to confine or execute its citizens. *See, e.g.*, *Batson*, 476 U.S. at 86 ("The petit jury has occupied a central position in our system of justice by safeguarding a person accused of crime against the arbitrary exercise of power by prosecutor or judge."). A longstanding pillar of this Court's jurisprudence is that the jury stands as a criminal defendant's fundamental "'protection of life and liberty against race or color prejudice.'" *Batson*, 476 U.S. at 87 (quoting *Strauder*,

100 U.S. at 309). Additionally, "the jury system performs the critical governmental function[] of . . 'ensur[ing] continued acceptance of the laws by all of the people.'" *Edmonson*, 500 U.S. at 624 (quoting *Powers*, 499 U.S. at 407); *see also infra* Part I.C (discussing linkages among jury, public confidence, and integrity of the judicial system).

The presence of racial bias in juries can be a pivotal factor in decisions affecting a defendant's liberty, life, and death.[5] Under such circumstances, "[r]acial prejudice undermines the jury's ability to perform its function as a buffer against governmental oppression and, in fact, converts the jury itself into an instrument of oppression." 27 Charles A. Wright & Victor J. Gold, *Fed. Prac. & Proc.: Evid.* § 6074 (2d ed. 2007). Indeed, even a single juror harboring racial bias can infect every aspect of the deliberations and drastically alter the course of other jurors' decision-making. *See Dyer v. Calderon*, 151 F.3d 970, 973 (9th Cir.) ("The bias or prejudice of even a single juror would violate [the defendant]'s right to a fair trial."), *cert. denied*, 525 U.S. 1033 (1998); *United States v. Hendrix*, 549 F.2d 1225, 1227 (9th Cir.) ("If only one juror is unduly biased or prejudiced . the criminal defendant is denied his Sixth Amendment

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[5] The possibility that an individual could be sentenced to death by a racially biased jury and that a rule of evidence could trump constitutional protections and prevent any examination of such a claim is particularly troubling. *See, e.g.*, Colin Miller, *Dismissed with Prejudice: Why Application of the Anti-Jury Impeachment Rule to Allegations of Racial, Religious, or Other Bias Violates the Right to Present A Defense*, 61 Baylor L. Rev. 872, 897-98 (2009) (analyzing capital cases where Rule 606(b) was applied to prevent jurors from impeaching their verdicts with evidence of racial bias).

right to an impartial panel."), *cert. denied*, 434 U.S. 818 (1977).

Indeed, here the jury was initially unable to reach a verdict on any of the charges that Petitioner faced, and it ultimately failed to reach a verdict on the felony charge brought against him. Pet. 4. This sort of equivocation only confirms the likely reality that bias unfairly tilted the scales of justice.

B. This case presents a quintessential issue of racial bias in the jury system that warrants Supreme Court intervention.

Given this Court's longstanding practice of remedying racial bias in the jury system, especially when there is a clear and intractable circuit split, the case at bar warrants this Court's review. *See generally* Stern & Gressman, *Supreme Court Practice* 222 et seq. (8th ed. 2002) (key guidelines for the exercise of certiorari jurisdiction include the emergence of circuit splits and the importance of the legal issue).

The facts here are appalling: After a jury convicted Petitioner on several misdemeanor charges, two jurors informed his counsel that another juror had infected the jury's deliberations with racial animus. Specifically, the juror in question suggested that the jury should convict Petitioner on charges of attempted sexual assault, unlawful sexual conduct, and harassment, Pet. App. 3a, "because he's Mexican and Mexican men take whatever they want." *Id.* at 4a. The same juror also contended that the jury should not believe Petitioner's alibi witness because the witness was Hispanic. *Id.* at 4a-5a. Thereafter, Petitioner sought a new trial on the ground that his constitutional right to an impartial jury had been

violated. Over Justice Márquez's vigorous dissent, the Colorado Supreme Court held that applying Colorado's "no-impeachment" rule to bar courts from considering juror testimony of racial bias during deliberations is permissible under the Sixth Amendment.

The Colorado Supreme Court openly acknowledged that its decision had deepened the split of authority on a federal constitutional question. *Id.* at 23a n.4. Nonetheless, the court permitted the juror's racist remarks about Petitioner's guilt to go uninspected, *id.* at 16a, relying on dubious legal grounds regarding the relationship between constitutional rights and the rules of evidence, as discussed below, *infra* Part II.

Racial bias in jury deliberations continues to be a serious problem today, notwithstanding the progress that we, as a nation, have made towards greater equality and inclusion. In recent years, a number of courts across the country have faced incidents of racial animus in jury deliberations that are as offensive as those at issue here. *See, e.g.*, *Kittle v. United States*, 65 A.3d 1144, 1147-48 (D.C. 2013) (jurors allegedly asserted that "all 'blacks' are guilty regardless"); *State v. Brown*, 62 A.3d 1099, 1106, 1110 (R.I. 2013) (juror allegedly referred to Native American defendants as "those people" and mockingly beat water bottles "like tom-tom drums"); *United States v. Villar*, 586 F.3d 76, 81, 85-87 (1st Cir. 2009) (in case involving Hispanic defendant, one juror allegedly said "I guess we're profiling but they cause all the trouble"); *United States v. Benally*, 546 F.3d 1230, 1231 (10th Cir. 2008) (juror allegedly said, in case with Native American defendant, that "[w]hen Indians get alcohol, they all get drunk, and . when

they get drunk, they get violent").[6] Many of those courts have rightly concluded that such expressions of race-based impartiality cannot go unaddressed.[7]

This is plainly an important issue given impartial juries are central to the fair administration of justice and in light of the range of circuits and states that are confronted with incidents of juror bias. Moreover, the constitutional law that applies to the Colorado Rules of Evidence also applies to the Federal Rules of Evidence, after which Colorado's rules (and many other states' equivalents) are modeled. *See* Pet. App.

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[6] *See also, e.g., Commonwealth v. Laguer*, 571 N.E.2d 371, 375 (Mass. 1991) (during deliberations in aggravated rape trial, juror allegedly asserted that "spics screw all day and night" and alluded to defendant's guilt); *Shillcutt v. Gagnon*, 827 F.2d 1155, 1156 (7th Cir. 1987) (in prostitution case, white male juror commented about the defendant, "Let's be logical. He's black and he sees a seventeen year old white girl – I know the type."); *United States v. Heller*, 785 F.2d 1524, 1526 (11th Cir. 1986) (juror allegedly made ethnic slurs and jokes during trial of Jewish defendant).

[7] *See, e.g., Brown*, 62 A.3d at 1110 ("no-impeachment" rule cannot preclude admission of testimony concerning jurors' racial bias in deliberations where necessary to protect defendant's constitutional right to fair trial by impartial jury); *Villar*, 586 F.3d at 85-87 (trial court has discretion to conduct inquiry into jurors' expressions of racial animus during deliberations under the Sixth Amendment and the Due Process Clause); *Laguer*, 571 N.E.2d at 376 (Sixth Amendment requires consideration of juror testimony alleging racially biased statements during deliberations because "the possibility that the defendant did not receive a trial by an impartial jury, which was his fundamental right, cannot be ignored"); *Heller*, 785 F.2d at 1527-28 (reversing conviction of Jewish defendant in light of allegations that juror engaged in ethnic slurs and jokes during trial because it "displayed the sort of bigotry that clearly denied the defendant the fair and impartial jury that the Constitution mandates"); *see also* Pet. 14-15.

7a ("Colorado's rule is virtually identical to its federal counterpart.").

This Court's previous admonition remains as true today as ever before: We "cannot deny that . . . racial and other forms of discrimination still remain a fact of life, in the administration of justice as in our society as a whole. Perhaps today that discrimination takes a form more subtle than before. But it is not less real or pernicious." *Rose*, 443 U.S. at 545. In short, "[r]ace discrimination within the courtroom raises serious questions as to the fairness of the proceedings conducted there." *Edmonson*, 500 U.S. at 628. "If our society is to continue to progress as a multiracial democracy, it must recognize that the automatic invocation of race stereotypes retards that progress and causes continued hurt and injury." *Id.* at 630-31. For all these reasons, the Court should adhere to its longstanding tradition of promoting fairness in the criminal justice system by reviewing the still-pressing issue of racial bias in the jury system once more.

C. If racial bias is allowed to infect jury deliberations with impunity, public confidence in the criminal justice system will be seriously undermined.

The jury exists, in part, to instill public confidence in our legal system, but when racial bias in jury deliberations is allowed to fester, this important trust is eroded. "[T]he jury system performs the critical governmental functions of guarding the rights of litigants and 'ensur[ing] continued acceptance of the laws by all of the people.'" *Edmonson*, 500 U.S. at 624 (quoting *Powers*, 499 U.S. at 407); *see also McCollum*, 505 U.S. at 49 ("One of the goals of our jury system is 'to impress upon the criminal defendant and the community that a verdict is

given in accordance with the law by persons who are fair. '") (quoting *Powers*, 499 U.S. at 413).[8] Allowing racial prejudice in juries to proceed unchecked undermines these foundational constitutional and democratic values. "Racial bias mars the integrity of the judicial system and prevents the idea of democratic government from becoming a reality," thereby "compound[ing] the racial insult inherent in judging a citizen by the color of his or her skin." *Edmonson*, 500 U.S. at 628 (citations omitted).

As recurring majorities of this Court have made clear, racial discrimination in the jury system imposes at least two critical systemic harms:

First, prejudice in the jury system impairs the fairness of specific proceedings. *See, e.g., id.* (discrimination in the courtroom "raises serious questions as to the fairness of the proceedings conducted there"); *Powers*, 499 U.S. at 411 ("[R]acial discrimination in the selection of jurors . places the fairness of a criminal proceeding in doubt."). This, in turn, "destroys the appearance of justice and thereby casts doubt on the integrity of the judicial process" overall. *Rose*, 443 U.S. at 555-56; *see also id.* at 556 (allowing jury partiality to fester "impairs the confidence of the public in the administration of justice"); *J.E.B.*, 511 U.S. at 140 (unredressed juror prejudice "invites cynicism respecting the jury's neutrality and its obligation to adhere to the law"); *id.* (noting the "inevitable loss of confidence in our judicial system that state-sanctioned discrimination in the courtroom engenders"). Indeed, bias in the jury

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[8] Indeed, this Court has made clear that "[t]he need for public confidence is especially high in cases involving race related crimes," where "emotions in the affected community will inevitably be heated and volatile." *McCollum*, 505 U.S. at 49.

system "undermine[s] the very foundation of our system of justice – our citizens' confidence in it." *McCollum*, 505 U.S. at 49-51.

Second, racial bias in the jury system injures the broader community and democratic ideals. *See Ballard v. United States*, 329 U.S. 187, 195 (1946) ("The injury is not limited to the defendant – there is injury to the jury system, to the law as an institution, to the community at large, and to the democratic ideal reflected in the processes of our courts."); *see also J.E.B.*, 511 U.S. at 140 ("The community is harmed by the State's participation in the perpetuation of invidious group stereotypes."); *Batson*, 476 U.S. at 87 (explaining that the harm "extends beyond that inflicted on the defendant and the excluded juror to touch the entire community"). And, as this Court repeatedly has emphasized, race-based discrimination in juries "'is at war with our basic concepts of a democratic society and a representative government.'" *Rose*, 443 U.S. at 556 (quoting *Smith v. Texas*, 311 U.S. 128, 130 (1940)).

The Court's failure to intervene in this case leaves untouched an outcome likely to erode public trust in the criminal justice system. In the instant case, two jurors lodged affidavits averring that a third juror urged the jury to convict Petitioner "because he's Mexican and Mexican men take whatever they want" – a statement that speaks directly to the defendant's guilt and motive – and challenged on racial grounds an alibi witness's credibility.[9] Permitting such

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[9] In some instances, a racial epithet alone will – in light of its substance and context – be egregious enough to raise a presumption of bias. *See generally* Brief of the NAACP Legal Defense and Educational Fund, Inc. as *Amicus Curiae* in Support of Petitioner, *Sterling v. Dretke*, 117 Fed. App'x 328 (5th

prejudice to stand without redress would lead to fundamental unfairness in Petitioner's case, significant impairment of public confidence in our system of justice, and broader wounds to our society and its democratic ideals. The Court should not countenance such racial bias expressed by the representative of an institution designed to ensure fairness and equality in our criminal justice system.

It is especially important for this Court to continue its longstanding commitment to the eradication of racial discrimination in the jury system because such forms of racial bias have deep and obdurate roots. Throughout the post-Civil War period, and even as this Court began to overturn state laws restricting jury service based on race, these forms of exclusion and bias persisted. *See, e.g.*, Michelle Alexander, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness* 119 (2010) (tracing the return of the all-white jury during the Reconstruction era). In some instances, biased juries issued verdicts as a symbol of resistance to integration and civil rights laws. *See, e.g.*, John C. Tucker, *Trial and Error: The Education of a Courtroom Lawyer* 288 (2003) (jury foreman said he hoped that the verdict, ruling against Black homeowners in a housing segregation case, would help end "the mess Earl Warren made with *Brown v. Board of Education* and all that nonsense"). In others, prejudiced juries issued indictments in ways that endorsed or exacerbated racial violence. *See, e.g.*, Charles Abrams, *Forbidden Neighbors: A Study of Prejudice in Housing* 103-19

Cir.) (unpublished), *cert. denied*, 544 U.S. 1053 (2005), 2005 WL 952252 (Apr. 22, 2005). But here, we have more than a presumption of bias; the juror's expressed stereotype spoke directly to the defendant's guilt and motive and to an alibi witness's credibility.

(1955), *in The Suburb Reader* 328-30 (Becky M. Nicolaides & Andrew Wiese eds., 2006) (grand jury refused to indict the white mob that attacked the family of a Black veteran that had moved into an all-white apartment building, instead charging the family's NAACP attorney and the apartment building's owner, attorney, and agent).

Throughout the course of the twentieth century and continuing to the modern day, this Court has understood that the problem of racial prejudice in juries is especially damaging to the integrity of the judicial system and our nation's democratic ideals. This Court's decisions, therefore, have consistently treated racial bias as a uniquely injurious problem meriting an exceptional legal response. *See, e.g.*, *Edmonson*, 500 U.S. at 618 (referencing "over a century of jurisprudence dedicated to the elimination of race prejudice within the jury selection process"). The Court should grant the Petition in this case in order to ensure public faith in the jury verdict and the judicial process as a whole.

II. THE COLORADO SUPREME COURT FUNDAMENTALLY MISAPPREHENDED THE CONSTITUTIONAL SIGNIFICANCE OF RACIAL BIAS IN JURIES.

At the most basic level, the Colorado Supreme Court failed to recognize this Court's repeated holdings about the special salience of racial bias in the jury system. As explained above, this Court has long emphasized a constitutional imperative to remove racial animus – an "especially pernicious" form of bias – from the criminal justice system. *See Rose*, 443 U.S. at 555-56. Yet, nowhere did the Colorado Supreme Court even cite to any of this Court's precedents regarding how "racial animus"

intolerably "distort[s] our system of criminal justice." *McCollum*, 505 U.S. at 58. Nor did the Colorado court acknowledge this Court's jurisprudence making clear that the failure to redress racial prejudice in a jury subverts the foundational purposes of the right to a jury trial. *See id.* at 49-51. Indeed, it was only the dissent below that pointed out how "[r]acial bias differs from other forms of bias in that it compromises institutional legitimacy." Pet. App. 25a.

Instead, the Colorado Supreme Court majority erroneously equated constitutional principles with evidentiary rules. Pet. App. 2a (comparing "two fundamental tenets": "a defendant's constitutional right to an impartial jury" and the protections of the state's "no-impeachment" rule). The court plainly erred in according rules of evidence the same legal weight as a core provision of our federal constitution. *See* U.S. Const. Art. VI (Supremacy Clause); *Crawford v. Washington*, 541 U.S. 36, 51 (2004) ("[W]e once again reject the view that the Confrontation Clause['s] . . application . . depends upon 'the law of Evidence for the time being.'"); 27 Wright & Gold § 6074 ("Evidentiary rules that insulate from discovery the violation of constitutional rights may themselves violate those rights."). This gross error alone invites the Court's intervention.

Given that the U.S. Constitution, especially the Sixth Amendment's impartial jury trial right, values the need for public confidence in the judicial process, *supra* Part II.C, it is particularly ironic that the Colorado Supreme Court invoked the public confidence stemming from the privacy and finality of jury verdicts to support its decision to bypass the Sixth Amendment. The majority opinion got it precisely backwards.

Indeed, in *Aldridge v. United States*, 283 U.S. 308 (1931), this Court expressly rejected the argument "that it would be detrimental to the administration of the law in the courts of the United States to allow questions to jurors as to racial or religious prejudices," *id.* at 314-15, on the ground that "it would be far more injurious to permit it to be thought that persons entertaining a disqualifying prejudice were allowed to serve as jurors and that inquiries designed to elicit the fact of disqualification were barred," *id.* at 315. Here, too, there would be "[n]o surer way to bring the processes of justice into disrepute," *id.*, than to insulate a juror's racial bias from judicial scrutiny or redress.

Even if it were a close call as to whether the Sixth Amendment should give way to evidentiary rules – which it is not – this Court has evinced particular concern for the public "impression that the judicial system has acquiesced" to certain forms of discrimination "or that the 'deck has been stacked' in favor of one side." *J.E.B.*, 511 U.S. at 140. "The fear that too much scrutiny of jury deliberations would undermine public confidence in jury verdicts ignores the demoralizing effect on public confidence caused by reports that jurors are racist, but evidence of their racism is not admissible to overturn their verdicts." Note, *Racist Juror Misconduct During Deliberations*, 101 Harv. L. Rev. 1595, 1600 (1988) (footnote omitted). "Permitting defendants to expose racially tainted deliberations gives the public – particularly [communities of color] – *more* reason, not *less*, to trust the final results of the criminal justice system." *Id.*

In fact, this Court has already recognized that "[t]here may be cases of juror bias so extreme that, almost by definition, the jury trial right has been abridged. If and when such a case arises, the Court

can consider whether the usual safeguards are or are not sufficient to protect the integrity of the process." *Warger v. Shauers*, 135 S. Ct. 521, 529 n.3 (2014). In other contexts, members of this Court have recognized the desirability of having a postconviction hearing "to determine whether a juror is biased." *Phillips*, 455 U.S. at 221-22 (O'Connor, J., concurring); *see also id.* (noting that there "are some extreme situations that would justify a finding of implied bias"). This case, in which a juror expressly urged the jury to convict a defendant based on his race, presents exactly the sort of "extreme" situation that the Court noted in *Warger*.

The remainder of the Colorado Supreme Court's reasoning about the costs and benefits of ignoring racial bias in the jury system is deeply flawed. Concerns about attorney harassment alone cannot support an unbounded application of Rule 606(b), because many jurors volunteer information about racial bias in deliberations, and the rule otherwise contains exceptions allowing testimony about "outside influence" and "extraneous information." *See, e.g.*, 27 Wright & Gold § 6072 (noting that "sometimes a juror volunteers to take the stand, coming forward not as a result of an attorney 'fishing expedition,'" and that Rule 606(b) "contains exceptions permitting testimony about 'extraneous information' and 'outside influence'"); Edward T. Swaine, *Pre-Deliberations Juror Misconduct, Evidential Incompetence, and Juror Responsibility*, 98 Yale L.J. 187, 194 (1988) (noting the "evident willingness of jurors to volunteer information" and explaining Rule 606(b)'s exceptions arguably "permit[] good faith attempts to discover evidence relating to an 'outside influence'"); *see also Racist Juror Misconduct During Deliberations*, 101 Harv. L.

Rev. at 1599 ("[A]n exception for testimony pertaining to racist juror misconduct would not significantly impair rule 606(b)," yet "would promote universally accepted countervailing interests – the defendant's and society's interests in having a criminal justice system free of racial bias.").

Further, the Colorado Supreme Court failed to consider that other protections sufficiently address the valid policy concerns underlying Rule 606(b). *See e.g.*, Nicholas S. Bauman, *"Extraneous Prejudicial Information": Remedying Prejudicial Juror Statements Made During Deliberations*, 55 Ariz. L. Rev. 775, 798, 802 & nn.245-47 (2013) (describing other rules some jurisdictions have adopted to protect jurors from harassment); Benjamin T. Huebner, *Beyond Tanner: An Alternative Framework for Postverdict Juror Testimony*, 81 N.Y.U. L. Rev. 1469, 1493-95 (2006) (noting that states place other limits on attorneys or their investigators contacting jurors after trial). And it was erroneous for the Colorado Supreme Court majority to think that voir dire could root out racial bias in jury deliberations, *see* Pet. 21 25, because jurors are unlikely to publicly admit to their own racial prejudices, Pet. 23-24, and jurors' unconscious biases may later manifest as explicit bias during deliberations.[10]

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[10] *See, e.g.*, Mark W. Bennett, *Unraveling the Gordian Knot of Implicit Bias in Jury Selection: The Problems of Judge-Dominated Voir Dire, the Failed Promise of Batson, and Proposed Solutions*, 4 Harv. L. & Pol'y Rev. 149, 152 (2010) ("Implicit biases are unstated and unrecognized and operate outside of conscious awareness. Social scientists refer to them as hidden, cognitive, or automatic biases, but they are nonetheless pervasive and powerful."); Pet. 23 (discussing observations of federal judge on unconscious bias).

On balance, courts are readily equipped to deal with extreme and extraordinary instances of juror bias, such as those in this case, and should not ignore a defendant's Sixth Amendment impartial jury trial right irrespective of governing evidentiary rules. *See* Pet. 26, 29. The constitutional imperative to guarantee a fair and impartial trial to all criminal defendants takes primacy over any countervailing evidentiary concerns, and this Court should resolve the existing circuit split to make that mandate clear and unequivocal.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

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IN THE

Supreme Court of the United States

MIGUEL ANGEL PEÑA-RODRIGUEZ,

Petitioner,

v.

STATE OF COLORADO,

Respondent.

On Petition for a Writ of Certiorari to the Colorado Supreme Court

BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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CASES — Page(s)

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McDonald v. Pless,
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McDonough Power Equip., Inc. v. Greenwood,
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Rock v. Arkansas,
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Smith v. Texas,
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United States v. Benally,
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United States v. Henley,
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United States v. Martinez-Salazar,
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United States v. Shalhout,
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United States v. Valdovinos,
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United States v. Villar,
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TABLE OF AUTHORITIES—Continued

Page(s)

Warger v. Shauers,
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Washington v. Texas,
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Williams v. Price,
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Wright v. United States,
559 F Supp. 1139 (E.D.N.Y. 1983) 14

RESEARCH STUDIES

Marianne Bertrand et al., *Implicit Discrimination*, 95(2) The Am. Econ. Rev. 94 (2005) 9

Dolly Chugh, *Societal & Managerial Implications of Implicit Social Cognition: Why Milliseconds Matter*, 17(2) Soc. Just. Res. 203 (2004) 9

Jerry Kang & Kristin Lane, *Seeing through Color-blindness: Implicit Bias and the Law*, 58 UCLA L. Rev. 465 (2010) 8

Justin Levinson, *Forgotten Racial Equality: Implicit Bias, Decisionmaking, and Misremembering*, 57 Duke L. J. 345 (2007) 9

Justin Levinson, Huajian Cai, & Danielle Young, *Guilty by Implicit Racial Bias: The Guilty/Not Guilty Implicit Association Test*, 8 Ohio State J. Crim. L. 187 (2010) 8, 9

TABLE OF AUTHORITIES—Continued

Page(s)

Justin Levinson & Danielle Young, *Different Shades of Bias: Skin Tone, Implicit Racial Bias, and Judgments of Ambiguous Evidence*, 112 W. Va. L. Rev. 307 (2010) 8

Samuel Sommers & Phoebe Ellsworth, *Race in the Courtroom: Perceptions of Guilt & Dispositional Attributions*, 26(11) Personality & Soc. Psychol. Bull. 1367 (2000) 9

Samuel R. Sommers & Phoebe C. Ellsworth, *How Much Do We Really Know About Race & Juries? A Review of Social Science Theory & Research*, 78 Chi.-Kent L. Rev. 997 (2003) 7

OTHER AUTHORITIES

27 Charles A. Wright & Victor J. Gold, *Federal Practice & Procedure: Evidence* § 6074 (2d ed. 2007) 4, 12

Mark W Bennett, *Unraveling the Gordian Knot of Implicit Bias in Jury Selection: The Problems of Judge-Dominated Voir Dire, the Failed Promise of Batson, and Proposed Solutions*, 4 Harv. L. & Pol'y Rev. 149 (2010) 7, 8

Ashok Chandran, *Color in the "Black Box": Addressing Racism in Juror Deliberations*, 5 Colum. J. Race & L. 28 (2015) 16

Colorado Rule of Evidence 606(b) ..... *passim*

TABLE OF AUTHORITIES—Continued

Page(s)

Dep't of Justice, Bureau of Justice Statistics, E. A. Carson, Prisoners in 2014 (September 2015), http://www.bjs.gov/content/pub/pdf/p14.pdf 6

Faye Crosby, Affirmative Action is Dead; Long Live Affirmative Action (2004) 7

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INTEREST OF *AMICUS CURIAE*

The National Association of Criminal Defense Lawyers (NACDL) is the preeminent organization advancing the mission of the criminal defense bar to ensure justice and due process for persons accused of crime or wrongdoing. As a nonprofit, voluntary professional bar association, NACDL represents approximately 9,200 direct members, made up of private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges. NACDL frequently appears as *amicus curiae* before this Court, the federal courts of appeals, and the state supreme courts in cases raising issues of importance to criminal defendants and the defense bar.[1]

In this case, NACDL has an interest in ensuring that no-impeachment rules, such as Colorado Rule of Evidence 606(b), are interpreted and applied in a manner consistent with a criminal defendant's constitutional right to a full and fair trial by an impartial jury.

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[1] No counsel for a party authored this brief in whole or in part. No one other than *amicus curiae*, its members or *amicus*'s counsel made a monetary contribution intended to fund the preparation or submission of this brief. Counsel of record for all parties received notice at least ten days prior to the due date of *amicus*'s intention to file this brief. Letters from counsel for the parties consenting to the filing of this brief have been filed with the Clerk of the Court.

SUMMARY OF THE ARGUMENT

A bare majority of the Colorado Supreme Court held that Colorado's no-impeachment rule—Colorado Rule of Evidence (CRE) 606(b)—precluded petitioner from introducing numerous statements of racial bias made by a juror during deliberations in which petitioner was convicted of three misdemeanor charges. The state supreme court ruled that CRE 606(b), which is identical to numerous state and federal evidentiary laws, is an inflexible rule that does not yield to a criminal defendant's constitutional right to a fair trial by an impartial jury.

This Court warned against that application of no-impeachment rules last Term in *Warger v. Shauers*, noting that there "may be cases of juror bias so extreme that, almost by definition, the jury trial right has been abridged." 135 S. Ct. 521, 529 n.3 (2014). But the majority below, in a footnote, rejected this Court's guidance as ambiguous. Pet. App. 16a n.6. The majority likewise ignored the long-established direction from this Court that no-impeachment rules such as CRE 606(b) cannot be applied inflexibly lest the "plainest principles of justice" may be violated. *McDonald v. Pless*, 238 U.S. 264, 269 (1915). And, the majority failed to recognize the prevailing view that courts can and should consider evidence of racial or ethnic bias during jury deliberations. The majority instead reasoned that "'[p]rotecting the secrecy of jury deliberations'" invariably trumps "a defendant's opportunity to vindicate his fundamental constitutional right to an impartial jury untainted by the influence of racial bias." Pet. App. 27a (Márquez, J., dissenting (quoting *id.* at 13a)). That holding is unconscionably wrong.

Racial and ethnic bias continue to pervade and undermine our criminal justice system, including jury deliberations. Voir dire is not a capable tool to identify subtle but pernicious manifestations of racial and ethnic bias. Yet lower courts have struggled to identify the proper balance between admitting statements of juror bias to ensure a fair trial and protecting jury deliberations from unnecessary intrusion by the court.

A limited intrusion into jury secrecy is warranted here to eradicate injury to the defendant, "to the jury system, to the law as an institution, to the community at large, and to the democratic ideal reflected in the processes of our courts." *Id.* at 18a–19a (Márquez, J., dissenting) (quoting *Rose v. Mitchell*, 443 U.S. 545, 556 (1979)). This limited intrusion also is essential to protect paramount constitutional concerns—the right to receive a fair trial by an impartial jury and the right to present a complete defense—that cannot otherwise be protected through the usual safeguards. By standing idly by in hopes that this discrimination will be caught by other means, the judiciary becomes an accomplice in the erosion of "our basic concepts of a democratic society and a representative government." *Smith v. Texas*, 311 U.S. 128, 130 (1940).

The petition is an appropriate vehicle to consider the important question presented because the racial bias expressed in this case is so "extreme" that the "jury trial right has been abridged," *Warger*, 135 S. Ct. at 529 n.3., and the "plainest principles of justice" have been violated, *McDonald*, 238 U.S. at 269. If petitioner's case involving multiple statements of overt racial and ethnic bias does not fit neatly into *Warger*'s footnote 3, it is hard to imagine any constitutional limits on no-impeachment rules.

ARGUMENT

I. Racial and ethnic bias in jury deliberations erodes public confidence in a criminal justice system already plagued by racial disparity.

The fundamental importance of the question presented is beyond dispute. Pernicious bias in jury deliberations is a recurring and serious issue that casts doubt on the fairness and impartiality of our criminal justice system—a system that already faces significant racial disparity in the prison population. Although rules limiting the admissibility of statements made during jury deliberations are intended to protect the "community's trust in a system that relies on the decisions of laypeople," *Tanner v. United States*, 483 U.S. 107, 121 (1987), ignoring evidence of overt racial or ethnic bias has "precisely the opposite effect." Pet. App. 18a (Márquez, J., dissenting). It allows the "jury itself [to become] an instrument of oppression." 27 Charles A. Wright & Victor J. Gold, *Federal Practice & Procedure: Evidence* § 6074 (2d ed. 2007).

1. "Let's be logical. He's black and he sees a seventeen year old white girl—I know the type." *Shillcutt v. Gagnon*, 827 F.2d 1155, 1156 (7th Cir. 1987) (internal quotation marks omitted). "When Indians get alcohol, they all get drunk, and when they get drunk, they get violent." *United States v. Benally*, 546 F.3d 1230, 1231 (10th Cir. 2008) (internal quotation marks omitted). "[T]he defendants [were] guilty because they were of Arabic descent." *United States v. Shalhout*, 507 F. App'x 201, 203 (3d Cir. 2012) (internal quotation marks omitted). "I guess we're profiling, but [Hispanics] cause all the trouble." *United States v. Villar*, 586 F.3d 76, 78 (1st Cir. 2009) (internal quotation marks omitted). "All the niggers should

hang." *United States v. Henley*, 238 F.3d 1111, 1113 (9th Cir. 2001) (internal quotation marks omitted).

Each of these statements was expressed by a juror during deliberations in a criminal case. Each of these biases escaped detection during voir dire and throughout an ostensibly constitutional trial. And each statement is abhorrent to our judicial system and envelops each trial in an impermeable cloud of doubt. The petition presents a timely opportunity for this Court to decide the extent to which criminal defendants will be allowed to introduce such evidence of juror bias to challenge the fairness of their trials.

These statements are far from isolated incidents. In 2008, a state court considered the effect of a juror's declaration that "race was an issue from the inception of the trial." *Commonwealth v. Steele*, 961 A.2d 786, 807 (Pa. 2008). A co-juror had "noted the race of three victims and stated that, on that basis alone, the defendant was probably guilty" and should "fry, get the chair or be hung." *Id.* at 807–08 (internal quotation marks omitted).

In another case, one juror called another a "nigger lover," a fact the defendant sought to introduce after the verdict. *Williams v. Price*, 343 F.3d 223, 225, 227 (3d Cir. 2003) (Alito, J.) (internal quotation marks omitted). The court of appeals stopped short of opining whether "testimony of the type at issue" could be constitutionally excluded under Federal Rule of Evidence 606(b)—the federal analog to CRE 606(b)—but nonetheless felt constrained, under the high standards applicable to habeas actions, to "hold only that the exclusion of such testimony does not contravene or represent an unreasonable application of clearly established federal law." *Id.* at 237.

And, here, one juror with a purported law enforcement background infected the jury with virulent statements of racial and ethnic bias: "'[The defendant] did it because he's Mexican and Mexican men take whatever they want.'" Pet. App. 4a. "'[N]ine times out of ten Mexican men [are] guilty of being aggressive toward women and young girls.'" *Id.* "'Mexican men [have] a bravado that cause[] them to believe they [can] do whatever they want[] with women.'" *Id.* The juror also allegedly stated his belief that defendant's alibi witness was not credible because he is "'an illegal.'" *Id.* at 5a. In point of fact, the alibi witness was a legal resident. Pet. 5.

2. These examples reflect only a small subset of instances where bias has poisoned jury deliberations. Both statistics and studies suggest a much more pervasive problem that results in significant racial disparity in our prison population.

At year-end 2014, 2.7% of black males and 1.1% of Hispanic males were serving sentences of at least one year in state or federal prison while less than 0.5% of white males were imprisoned. *See* Dep't of Justice, Bureau of Justice Statistics, E. A. Carson, Prisoners in 2014, at 15 & Table 10 (September 2015), http://www.bjs.gov/content/pub/pdf/p14.pdf. In every age group, black males were imprisoned at a higher rate than white males. *See id.* Among inmates ages 18 to 19, black males were more than 10 times more likely, and Hispanic males nearly 3.5 times more likely, to be in state or federal prison than white males. *See id.* Between the ages of 30 and 34, 6.4% of black males and 2.5% of Hispanic males were imprisoned while just 1.1% of white males were imprisoned. *See id.*

Legal guilt alone does not explain these disparities. "Studies have shown that, controlling for legally

relevant differences, black defendants are more likely to be confined before trial, more likely to be sentenced to prison when non-prison sentences are available, and more likely to receive longer sentences than their white counterparts." *United States v. Valdovinos*, 760 F.3d 322, 332 (4th Cir. 2014) (Davis, J. dissenting) (citing Michael Tonry, *Punishing Race: A Continuing American Dilemma* 70–76 (2011); Cassia Spohn, Racial Disparities In Prosecution, Sentencing, and Punishment 166–93 (2013), in *The Oxford Handbook of Ethnicity, Crime, and Immigration* (S. Bucerius, et al., ed. 2013)). In other words, bias infects and affects every stage of criminal prosecutions.

3. Racial and ethnic bias in the jury room remains a real threat, one that often lurks undetected beneath the surface of a trial. "[S]ubstantial evidence exists to support the conclusion of many legal scholars that, at least under some conditions, White jurors exhibit racial bias in their verdicts and sentencing decisions." Samuel R. Sommers & Phoebe C. Ellsworth, *How Much Do We Really Know About Race & Juries? A Review of Social Science Theory & Research*, 78 Chi.-Kent L. Rev. 997, 1010 (2003).

Bias can be divided into two categories. Explicit bias is prejudice knowingly held. Once common, the United States has seen a "dramatic decrease" in explicit bias over the past several decades. Faye Crosby, Affirmative Action is Dead; Long Live Affirmative Action 202 (2004).

But a subtler form of bias persists, which is harder to identify or prevent during a trial. Implicit bias is "unstated and unrecognized and operate[s] outside of conscious awareness." Mark W. Bennett, *Unraveling the Gordian Knot of Implicit Bias in Jury Selection: The Problems of Judge-Dominated Voir Dire, the*

Failed Promise of Batson, and Proposed Solutions, 4 Harv. L. & Pol'y Rev. 149, 152 (2010). Referred to by social scientists as "hidden, cognitive, or automatic bias[]," implicit bias can lead the mind unintentionally to associate a trait with a person based solely on their race or ethnicity. *Id.*

Studies show that implicit biases are pervasive in this country, with a majority of individuals unknowingly harboring racial biases. *Id.* at 153. As two social scientists recently observed, "we are not, on average or generally, cognitively colorblind." Jerry Kang & Kristin Lane, *Seeing through Colorblindness: Implicit Bias and the Law*, 58 UCLA L. Rev. 465, 473 (2010). Studies indicate that implicit biases, no less than explicit biases, predict individual behavior and lead to discrimination.

These biases, both explicit and implicit, are prone to manifest in the jury room. In one recent study, social scientists examined whether altering the skin tone of a perpetrator in a security camera photo affected the way participants judged various pieces of trial evidence. Justin Levinson & Danielle Young, *Different Shades of Bias: Skin Tone, Implicit Racial Bias, and Judgments of Ambiguous Evidence*, 112 W. Va. L. Rev. 307, 331 (2010). Using photos of a perpetrator with progressively darker skin color, the study found that mock jurors' evaluation of trial evidence was influenced by racial bias. This racial bias predicted guilty and not guilty verdicts, with mock jurors more likely to find darker-skinned perpetrators guilty than lighter-skinned counterparts. *Id.* at 337–39.

Another study evaluated whether implicit racial bias affects a juror's evaluation of ambiguous evidence. Justin Levinson, Huajian Cai, & Danielle Young, *Guilty by Implicit Racial Bias: The Guilty/Not*

Guilty Implicit Association Test, 8 Ohio State J. Crim. L. 187, 190 (2010). The study suggested that mock jurors exhibited strong associations between black individuals and a guilty verdict (as compared with white individuals), and this implicit racial bias predicted how a juror evaluated ambiguous evidence. *Id.* at 204. That is, mock jurors appear to show an implicit racial bias that results in black men being afforded a weaker presumption of innocence. *Id.*

Other studies have found that mock jurors more easily recalled aggressive facts when the actor-defendant was black as opposed to white, and mock jurors rated the personality of different-race defendants as more violent as compared to same-race defendants. *See* Justin Levinson, *Forgotten Racial Equality: Implicit Bias, Decisionmaking, and Misremembering*, 57 Duke L. J. 345, 350 (2007); Samuel Sommers & Phoebe Ellsworth, *Race in the Courtroom: Perceptions of Guilt & Dispositional Attributions*, 26(11) Personality & Soc. Psychol. Bull. 1367, 1370–71, 1374–76 (2000).

The documented effects of implicit bias in mock juries are likely to be magnified in an actual jury setting, where pressures run high and the consequences are real. Time-pressured or stressful conditions, situations involving complex problems, and situations involving ambiguity have been suggested as especially conducive to activating implicit bias. *See, e.g.*, Marianne Bertrand et al., *Implicit Discrimination*, 95(2) The Am. Econ. Rev. 94, 95–97 (2005); Barbara Reskin, *Unconsciousness Raising*, Q1 Regional Rev. 33, 34, 36 (2005); Dolly Chugh, *Societal & Managerial Implications of Implicit Social Cognition: Why Milliseconds Matter*, 17(2) Soc. Just. Res. 203, 212, 216, 217 (2004). The context of jury

deliberations—which can and often does meet each of these criteria—provides a fertile ground for the influence of jurors' implicit biases.

In light of the impact that biases have on jurors' decision-making, courts should be permitted a reasonable degree of flexibility over whether to admit oral statements of racial or ethnic bias that are expressed in the jury room and that may have infected the verdict. While allowing a court to admit statements of potential bias in a jury room unfortunately cannot completely stamp out all racial and ethnic bias, it is a step towards reaching a more honest truth. As Reginald Rose said: "It's very hard to keep personal prejudice out of a thing like this. And no matter where you run into it, prejudice obscures the truth." Twelve Angry Men (Universal 1957). A court should not be complicit in furthering that obfuscation.

II. The admission of evidence showing juror bias during deliberations is necessary to protect the right to a fair trial.

No-impeachment rules like CRE 606(b) must yield to a defendant's constitutional right to an impartial jury and to present a complete defense where racial or ethnic bias infects a jury's deliberations.

1. "One touchstone of a fair trial is an impartial trier of fact—'a jury capable and willing to decide the case solely on the evidence before it.'" *McDonough Power Equip., Inc. v. Greenwood*, 464 U.S. 548, 554 (1984) (quoting *Smith v. Phillips*, 455 U.S. 209, 217 (1982)); *Warger*, 135 S. Ct. at 528 ("The Constitution guarantees both criminal and civil litigants a right to an impartial jury."). The Sixth Amendment guarantees defendants the "right to be tried by a jury free from

ethnic, racial, or political prejudice, . . or predisposition about the defendant's culpability." *Gomez v. United States*, 490 U.S. 858, 873 (1989) (internal citations omitted). The Constitution guarantees the right to a jury "without racial animus, which so long has distorted our system of criminal justice." *Georgia v. McCollum*, 505 U.S. 42, 58 (1992); *see also Ham v. South Carolina*, 409 U.S. 524, 526–27 (1973). Indeed, the presence of a partial juror "violates even the minimal standards of due process." *Irvin v. Dowd*, 366 U.S. 717, 722 (1961).

The Colorado Supreme Court's application of CRE 606(b) runs headlong into the right to an impartial jury. If a juror fails to acknowledge racial or other bias during voir dire, manifestations of that bias are likely to arise only in statements made during deliberations. Pet. 22. Jurors are, after all, uniformly instructed not to discuss the case until deliberations begin. Barring the admissibility of statements reflecting improper bias during deliberations would effectively foreclose a defendant's best chance to show that prejudice robbed him of a fair trial.

In *Warger*, this Court found no constitutional hurdle in prohibiting post-verdict testimony regarding a juror's potential bias against a plaintiff involved in a car accident. 135 S. Ct. at 529. "[J]uror impartiality [was] adequately assured by the parties' ability to bring to the court's attention any evidence of bias before the verdict is rendered, and to employ nonjuror evidence even after the verdict is rendered." *Id.* This Court noted, however, that "[t]here may be cases of juror bias so extreme that, almost by definition, the jury trial right has been abridged." *Id.* at 529 n.3. In such a case, the Court left open the question whether

"the usual safeguards are or are not sufficient to protect the integrity of the process." *Id.*

Tanner v. United States sets forth those "usual safeguards"—voir dire, the ability of the court and counsel to observe jurors during the trial, the ability of jurors to report misconduct prior to the verdict, and the availability of alternative non-juror evidence to show misconduct. 483 U.S. at 127. While these safeguards may work to ensure "finality" and "full and frank discussion in the jury room," *id.* at 120, they fail to "protect the integrity of the process" where racial or ethnic bias is present.

The potential for partiality and the corresponding strength of the constitutional guarantee guarding against it are especially significant where racial or ethnic bias is concerned:

> Eradication of the evil of state supported racial prejudice is at the heart of the Fourteenth Amendment. This suggests that the constitutional interests of the affected party are at their strongest when a jury employs racial bias in reaching its verdict. Racial prejudice undermines the jury's ability to perform its function as a buffer against governmental oppression and, in fact, converts the jury itself into an instrument of oppression. This also suggests that the policy interests behind the enforcement of Rule 606(b) are at their weakest in such a case.

Wright & Gold, *Federal Practice & Procedure: Evidence* § 6074. Indeed, "a principal purpose of the adoption of the Fourteenth Amendment was to prohibit the States from invidiously discriminating on the basis of race." *Ham*, 409 U.S at 526–27.

Concern with the finality of judgments and jury harassment cannot trump the need for jury impartiality, which is "so basic to a fair trial that [its] infraction can never be treated as harmless error." *Gray v. Mississippi*, 481 U.S. 648, 668 (1987) (internal quotation marks and citation omitted). "[T]he seating of any juror who should have been dismissed for cause . . . require[s] reversal." *United States v. Martinez-Salazar*, 528 U.S. 304, 316 (2000). In other words, juror partiality—particularly where it involves racial bias—is a "structural defect" that irretrievably taints a trial, making the need for a complete inquiry into juror impartiality more compelling than with respect to instances where a juror may be intoxicated, as in *Tanner*. *See Dyer v. Calderon*, 151 F.3d 970, 973 n.2 (9th Cir. 1998) ("The presence of a biased juror cannot be harmless; the error requires a new trial without a showing of actual prejudice. . . . [T]he presence of a biased juror introduces a structural defect not subject to harmless error analysis.") (internal citations omitted). Of course, the Court need not decide the remedy for a case infected by unlawful bias. The limited question here is whether such evidence can simply be admitted.

Concern for "the community's trust in [the judicial] system," *Tanner*, 483 U.S. at 121, also compels a full and fair determination of whether a verdict was rendered based on bias rather than on the merits. "[T]he impartiality of the adjudicator goes to the very integrity of the legal system." *Gray*, 481 U.S. at 668. Precisely because racial or ethnic prejudice in a jury room "is so shocking to the conscience and potentially so damaging to public confidence in the equity of our system of justice," courts must be allowed room to "correct any possible harmful effects" on criminal defendants. *United States v. Heller*, 785 F.2d 1524,

1527 (11th Cir. 1986). Those harmful effects are not isolated to criminal defendants, but "touch the entire community," including the jurors who are privy to another juror's prejudice. *Batson v. Kentucky*, 476 U.S. 79, 87 (1986). A juror may not only be gravely offended by the discrimination occurring within the jury room, but may lose confidence in a criminal justice system intended and reputed to be fair and impartial.

Given the paramount importance of eliminating racial and ethnic bias by juries and the inadequacy of other procedures to combat the issue, "if a criminal defendant could show that the jury was racially prejudiced, such evidence could not be ignored without trampling the sixth amendment's guarantee to a fair trial and an impartial jury." *Wright v. United States*, 559 F. Supp. 1139, 1151 (E.D.N.Y. 1983). Many courts thus have refused to apply no-impeachment rules like CRE 606(b) "so inflexibly as to bar juror testimony in those rare and grave cases where claims of racial or ethnic bias during jury deliberations implicate a defendant's right to due process and an impartial jury." *Villar*, 586 F.3d at 87.

2. For similar reasons, no-impeachment rules also implicate the constitutional right to present a complete defense. "Whether rooted directly in the Due Process Clause of the Fourteenth Amendment, or in the Compulsory Process or Confrontation clauses of the Sixth Amendment, the Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.'" *Crane v. Kentucky*, 476 U.S. 683, 690 (1986) (quoting *California v. Trombetta*, 467 U.S. 479, 485 (1984)) (internal citations omitted).

The right to present a defense "is abridged by evidence rules that 'infring[e] upon a weighty interest of the accused' and are 'arbitrary or disproportionate

to the purposes they are designed to serve.'" *Holmes v. South Carolina*, 547 U.S. 319, 324 (2006) (quoting *United States v. Scheffer*, 523 U.S. 303, 308 (1998)). This right extends beyond the guilt or innocence phase of a trial. *See Green v. Georgia*, 442 U.S. 95, 97 (1979) (holding exclusion of certain testimony denied defendant fair trial on issue of punishment and constituted violation of due process clause). This Court has repeatedly confronted, and rejected, proposed applications of evidentiary rules that would violate a criminal defendant's right to present fundamental defenses. *See, e.g.*, *Rock v. Arkansas*, 483 U.S. 44, 55 (1987); *Chambers v. Mississippi*, 410 U.S. 284, 294–96 (1973); *Washington v. Texas*, 388 U.S. 14, 18 (1967).

Precluding admission of juror testimony regarding racial bias during jury deliberations would infringe a weighty interest. "The right to . an impartial jury lies at the heart of due process," *Porter v. Illinois*, 479 U.S. 898, 900 (1986) (Marshall, J., dissenting from the denial of certiorari), and the right to object to jurors who "would be incapable of confronting and suppressing their racism" is paramount, *McCollum*, 505 U.S. at 58. If a party can "demonstrate that a juror failed to answer honestly a material question on voir dire, and then further show that a correct response would have provided a valid basis for a challenge for cause," he is entitled to a new trial. *McDonough*, 464 U.S. at 556.

A defense would be inherently incomplete without the ability to introduce evidence that the jury's deliberation was infected with unlawful prejudice. Barring such evidence would be "disproportionate to the ends" the rule is "asserted to promote." *Holmes*, 547 U.S. at 326. Safeguarding the freedom of deliberations in the jury room, *see Tanner*, 483 U.S. at 120–21,

cannot "justify the limitation imposed" on a defendant's right to defend himself on the ground that his trial was fundamentally unfair, *Rock*, 483 U.S. at 56.

Moreover, courts should not apply no-impeachment rules "mechanistically to defeat the ends of justice." *Chambers*, 410 U.S. at 302. "[I]t would not be safe to lay down any inflexible rule because there might be instances in which such testimony of the juror could not be excluded without violating the plainest principles of justice." *McDonald*, 238 U.S. at 268–69 (internal quotation marks omitted). Preventing a criminal defendant from proving that his trial was infected with unlawful racial or ethnic bias would certainly "violat[e] the plainest principles of justice." *Id.* at 269 (internal quotation marks omitted).

3. Voir dire is the traditional method for ferreting out those impermissible biases that could obstruct a defendant's constitutional right to an impartial jury and to present a complete defense. But voir dire is an imperfect filter. Voir dire cannot discover jurors who are reluctant to reveal—or even eager to conceal—their explicit biases. And, voir dire is impotent to uncover implicit bias that even the juror does not know he harbors. "'Asking a general question about impartiality and race is like asking whether one believes in equality for blacks; jurors may sincerely answer yes, they believe in equality and yes, they can be impartial, yet oppose interracial marriage and believe that blacks are more prone to violence.'" Ashok Chandran, *Color in the "Black Box": Addressing Racism in Juror Deliberations*, 5 Colum. J. Race & L. 28, 43–44 (2015) (quoting Sheri Lynn Johnson, *Black Innocence and the White Jury*, 83 Mich. L. Rev. 1611, 1670 (1985)).

Because jurors harboring virulent or latent racial prejudices can and do slip through voir dire, the court's

ability to protect the fairness of criminal proceedings can sometimes depend on evidence of statements made during jury deliberations. This petition presents a critical opportunity to fortify—or an equally troubling occasion to erode—the Constitution's guarantee that criminal defendants will be tried based on their conduct, not their race or ethnicity.

Racial and ethnic bias has no place in a system of justice intended to be impartial. To preclude evidence of overt racial bias in a jury room—indeed, to refuse to even consider whether such bias has affected a jury's deliberations—casts further shadow on, and "undermine[s] public confidence in the fairness of our system of justice." *Batson*, 476 U.S. at 87.

CONCLUSION

The Court should grant the petition for certiorari.

Respectfully submitted,

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IN THE

Supreme Court of the United States

MIGUEL ANGEL PEÑA RODRIGUEZ,
Petitioner,

v.

STATE OF COLORADO,
Respondent.

On Petition for a Writ of Certiorari to the Colorado Supreme Court

BRIEF OF NATIONAL CONGRESS OF AMERICAN INDIANS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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SCHOLARLY AUTHORITIES

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TABLE OF AUTHORITIES – continued

OTHER AUTHORITIES Page

J. Bell, *Mass Incarceration: A Destroyer of People of Color and Their Communities*, Huffington Post (May 17, 2010, updated May 25, 2011), http://www.huffingtonpost.com/jamaal-bell/mass-incarcerations-a-dest_b_578854.html 8

S. Buchanan, S. Poverty Law Ctr., *Violence Against American Indians is a Pervasive Problem* (Jan. 16, 2007), http://www.splcenter.org/get-informed/intelligence-report/browse-all-issues/2006/winter/indian-blood 8

L. Millet, *Native Lives Matter, Too*, N.Y. Times, Oct. 13, 2015 8

New Mexican Advisory Comm., U.S. Sentencing Comm'n, *The Farmington Report: Civil Rights for Native Americans 30 Years Later* (Nov. 2005) 9

S. Perry, Office of Justice Programs, U.S. Dep't of Justice, *American Indians and Crime: A BJS Statistical Profile, 1992-2002* (Dec. 2004), http://www.justice.gov/otj/pdf/american_indians_and_crime.pdf .. 6, 8

S.E. Ruckman, *FBI Hate Crime Report Shows Indians Remain Most Often Assaulted*, Native Times.com, http://nativetimes.com/index.php?option=com_content&task+view&id=516&Itemid=1 (last viewed Dec. 4, 2015) 7

S.D. Equal Justice Comm'n, *Final Report and Recommendations* (2006), http://ujs.sd.gov/uploads/docs/Equal_Justice_Commission_Report.pdf 9, 10

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INTEREST OF *AMICUS CURIAE*

Established in 1944, the National Congress of American Indians ("NCAI") is the oldest and largest American Indian organization, representing more than 250 Indian Tribes and Alaskan Native villages. NCAI and its member tribes are dedicated to protecting the rights and improving the welfare of American Indians and tribes.[1] NCAI regularly files *amicus* briefs in this Court on issues of importance to tribes and their members, including on issues of criminal law enforcement that affect Indians. See, *e.g.*, *United States v. Lara*, 541 U.S. 193 (2004).

NCAI's substantial interest in this case arises from its long term commitment to ensuring the fair and constitutional application of criminal laws to Native Americans subject to the criminal justice system. The rule of constitutional law announced by the Colorado Supreme Court – that the Constitution allows "no impeachment" rules to bar juror testimony about racially biased statements during deliberations that tie race to guilt – undermines the goal of equal justice for all, including Native Americans.

INTRODUCTION AND SUMMARY

Petitioner Pena-Rodriguez has demonstrated that the constitutional issue presented here is the subject of a clear, acknowledged conflict among the circuit

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[1] No counsel for any party to these proceedings authored this brief in whole or in part. No person or entity other than NCAI made a monetary contribution to the preparation or submission of this brief. Counsel of record for both parties have received timely notice of the intent to file this brief and have consented to its filing, and the letters of consent have been filed with the Clerk.

courts of appeals and the highest courts of a number of states, and that this Court should resolve the conflict to avoid a fundamental unfairness in the administration of criminal justice – specifically, the racial bias of jurors, openly expressed in deliberations to support a guilty vote and urge others to vote for a guilty verdict. This corruption of jury deliberations rightly concerns persons of all races. NCAI files this *amicus* brief to explain the historic and geographical reasons that the Sixth Amendment right to an impartial jury and jury deliberations free of discriminatory arguments directed at guilt are of critical importance to Native Americans.

First, the Major Crimes Act gives federal courts jurisdiction over violent crimes involving Indian defendants that occur in Indian country. As a result, Indians are substantially overrepresented among federal criminal defendants accused of and tried for violent crimes in federal courts. Discrimination against Native American defendants, accordingly, is particularly likely to taint the administration of criminal justice in federal courts.

Second, as detailed *infra*, there is substantial discrimination against Native Americans, particularly in states including Indian reservations and communities bordering reservations. This usually latent discrimination comes to the surface in jury deliberations, as exemplified in *United States v. Benally*, 546 F.3d 1230 (10th Cir. 2008), in which the jury foreman told other jurors deliberating on an assault charge against a Native American defendant that he lived near a reservation and that "'[w]hen Indians get alcohol, they all get drunk' and when they get drunk, they get violent." *Id.* at 1231 (alteration in original).

Finally, an individual juror's discrimination is likely to remain unexpressed when a jury is diverse, but jury venires are particularly unlikely to include Native Americans. The federal districts in which reservations are located are massive, and long distances often separate Indian country and the seats of federal district courts. This fact, in combination with the relative poverty of Indian country residents, means that Indian defendants are rarely tried by juries that include their peers, fellow residents of Indian country. Instead, the jury venires for federal district courts in Indian country states are overwhelmingly composed of state residents who lack any connection with Indian country or that community. See generally Kevin K. Washburn, *American Indians, Crime and the Law*, 104 Mich. L. Rev. 709 (2005-2006).

NCAI recognizes that this Court's principal consideration in granting a petition for certiorari is the existence of a conflict among the lower courts on an important question of federal law, all criteria that are satisfied here. NCAI writes to highlight the particular importance of the issue to Native American criminal defendants who are disproportionately disadvantaged and suffer intentional discrimination in jury deliberations in criminal cases in federal court. These circumstances have given rise to widespread Native American wariness about the criminal justice system. And where a jury verdict stands after a trial court concludes that jurors made statements during deliberations that directly relate to the criminal defendant's guilt or innocence and constitute intentional race discrimination, that mistrust may evolve into a conclusion of illegitimacy.

REASONS FOR GRANTING THE PETITION

NCAI will not rehash the arguments for conflict among the courts, the importance of the issue and the error of the lower court's ruling which have already been made in the petition. It files this *amicus* brief to set out the reasons that the issue presented is so significant to Native Americans.

I. THE SIXTH AMENDMENT RIGHT TO AN IMPARTIAL JURY IS UNIQUELY IMPORTANT TO INDIAN DEFENDANTS AND COMMUNITIES.

This Court has upheld the federal government's authority to assert jurisdiction over criminal offenses in Indian country since it resolved *United States v. Rogers*, 45 U.S. 567 (1846), and *United States v. Kagama*, 118 U.S. 375 (1886). See also *United States v. Antelope*, 430 U.S. 641, 648 (1977) ("Congress had undoubted constitutional power to prescribe a criminal code applicable in Indian country").

Today, as a result, federal law grants federal courts jurisdiction when Native Americans commit the crimes set forth in the Major Crimes Act of 1885 in "Indian country." See 18 U.S.C. § 1153.[2] "Indian country," in turn, is defined as all land within the boundaries of an Indian reservation including dependent communities and Indian allotments as provided in 18 U.S.C. § 1151.

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[2] The United States transferred criminal jurisdiction over reservations to some states in what is known as Public Law 280, Act of Aug. 15, 1953, ch. 505, § 2, 67 Stat. 588, 588-89 (codified as amended 18 U.S.C. § 1162(a)). Some of those states have retroceded jurisdiction to the tribes. Under current law, states cannot assume such jurisdiction without tribal consent.

Thus, "Federal criminal jurisdiction is an important fact of life for Indian people on Indian reservations in a way different than for other Americans." U.S. Sentencing Comm'n, *Report of the Native American Advisory Group* 1 (Nov. 4, 2003) ("*Advisory Group Report*"). For most Americans, any prosecution of a routine felony offense would be conducted by the laws and authorities of their state of residence. Federal authorities would prosecute only when the crime relates to a federal interest or to national or international concerns (*i.e.*, international drug trade or terrorism). Significantly, before the passage of the Major Crimes Act, tribal governments handled such crimes as tribal offenses, and the United States only rarely prosecuted Indian country crimes. *Id.*

The Major Crimes Act thus represented a fundamental change in the jurisdictional allocation, federalizing first six and now more than 20 felonies in Indian country, including manslaughter and aggravated assaults. (Most misdemeanors are still prosecuted by tribal governments in tribal courts.) The federal government has displaced the tribes as the chief source of law enforcement in cases involving serious crimes in Indian country. In thus "singling out particular communities defined by tribal membership and geography and by displacing tribal governments that handle many of the other important governmental responsibilities in these communities, the United States has undertaken a substantial responsibility for public safety and criminal justice in Indian communities." *Id.* at 3.

The effect of federal jurisdiction over Indian country on the makeup of the federal courts' docket of cases involving violent crimes is breathtaking. The *Advisory Group Report* observed:

> While Indian offenses amount to less than five percent of the overall federal caseload, they constitute a significant portion of violent crimes in federal court. Over eighty percent of manslaughter cases and over sixty percent of sexual abuse cases arise from Indian jurisdiction. Nearly half of all the murders and assaults arise from Indian jurisdiction.

Id. at 1-2 (citing U.S. Sentencing Comm'n, *2001 Sourcebook of Federal Sentencing Statistics*; U.S. Sentencing Comm'n, *Manslaughter Working Group Report to the Commission* (1997)). See also S. Perry, Office of Justice Programs, U.S. Dep't of Justice, *American Indians and Crimes: A BJS Statistical Profile 1992-2002* (Dec. 2004), http://www.justice.gov/otj/pdf/american_indians_and_crime.pdf.

The vast overrepresentation of Native Americans among federal offenders charged with the most serious violent crimes heightens the importance of the constitutional question presented to Native Americans who are tried for violent crimes in federal courts. Indeed, addressing juror prejudice is particularly critical in cases involving violent crimes. Such crimes carry the longest sentences and are the most likely to elicit strong emotional reactions from jurors that may be tied to stereotypes rather than direct evidence of guilt. See, *e.g.*, *Benally*, 546 F.3d at 1231-32 (juror stating that "'[w]hen Indians get alcohol, they all get drunk' and when they get drunk, they get violent," while second juror described a desire to "send a message back to the reservation") (alteration in original).

The Constitution leaves no room for discrimination in federal juries trying Indian defendants for violation of the felonies covered by the Major Crimes Act.

II. DISCRIMINATION AGAINST NATIVE AMERICANS REMAINS A SERIOUS PROBLEM, PARTICULARLY IN STATES WHICH INCLUDE RESERVATIONS.

This Court once said that Indians "owe no allegiance to the States and receive from them no protection. Because of local ill feeling, the people of the States where they are found are often their deadliest enemies." *Kagama*, 118 U.S. at 384. Plainly, this description of the State-Indian relationship and local hostility is too extreme today. Indians are now citizens, see Indian Citizenship Act of 1924, ch. 233, 43 Stat. 253. And, in the modern era, there has been substantial state and tribal cooperation on law enforcement issues and significant improvement in race relations in states encompassing Indian country. Nonetheless, discrimination against Native Americans remains a serious issue, particularly in areas bordering reservations.

As one scholar summarized, "[r]acism and bias remain strong, particularly in states where Indians compete with non-Indians for limited resources." K. Washburn, *supra*, at 764 & n.271 (citing Bryan H. Widenthal, *Fighting the* Lone Wolf *Mentality: Twenty-First Century Reflections on the Paradoxical State of American Indian Law*, 38 Tulsa L. Rev. 113, 145 (2001); Robert N. Clinton, *Criminal Jurisdiction over Indian Lands: A Journey Through A Jurisdictional Maze*, 18 Ariz. L. Rev. 503, 521 n.88 (1976)). In this regard – and suggestive of the depth of this racial issue – FBI statistics reveal that Native Americans are among the most predominant victims of hate crimes. See S.E. Ruckman, *FBI Hate Crime Report Shows Indians Remain Most Often Assaulted*, Native Times.com, http://nativetimes.com/index.php?option=com_content&task+view&id=516&Itemid

=1 (last viewed Dec. 4, 2015). "[W]hile American Indians and Alaska Natives comprise only 1% of the U.S. population, they represent 2% of victims of racially motivated hate crimes." S. Buchanan, S. Poverty Law Ctr., *Violence Against American Indians is a Pervasive Problem* (Jan. 16, 2007), http://www.splcenter.org/get-informed/intelligence-report/browse-all-issues/2006/winter/indian-blood. Native Americans experience violence "at a rate . . . more than twice the rate for the Nation." See Perry, *supra*, cover. A Department of Justice study, *American Indians and Crime*, found "a disturbing picture of the victimization of American Indians and Alaska Natives." *Id.* at iii.

In addition, Native Americans receive disproportionate sentences of imprisonment:

> [t]he incarceration rate of Native Americans is 38% higher than the national rate. The U.S. Commission on Civil Rights attributes this higher rate to differential treatment by the criminal justice system, lack of access to adequate counsel and racial profiling. . . Law enforcement agents arrest American Indians and Alaskan Natives at twice the rate of the greater U.S. population for violent and property crimes. On average, American Indians receive longer sentences than non-Indians for crimes.

J. Bell, *Mass Incarceration: A Destroyer of People of Color and Their Communities*, Huffington Post (May 17, 2010, updated May 25, 2011), http://www.huffingtonpost.com/jamaal-bell/mass-incarcerations-a-dest_b_578854.html (referring, *e.g.*, to *Advisory Group Report* at iii-iv). See also L. Millet, *Native Lives Matter, Too*, N.Y. Times, Oct. 13, 2015 ("American Indians are more likely than any other

racial group to be killed by the police, according to the Center on Juvenile and Criminal Justice").

State and federal civil rights organizations have also focused on discrimination against Native Americans. It was the post-hearing recommendations of the South Dakota Advisory Committee to the U.S. Commission on Civil Rights that led to the creation of the Ad Hoc Native American Advisory Group, and its 2003 Report on disparities in federal sentencing of Native Americans under the Major Crimes Act. See *Advisory Group Report* at 3. In 2005, the New Mexico Advisory Committee to the Commission issued *The Farmington Report: Civil Rights for Native Americans 30 Years Later* (Nov. 2005). This Report addressed relations between the Navajos and local residents of the Farmington, New Mexico area thirty years after "the brutal murder of three Navajo youths and numerous complaints from Navajo leaders concerning unequal protection and enforcement of the laws." *Id.* at ii. The Report concluded that while there have been significant improvements, "[p]roblems . . persist" with respect to "equal protection and enforcement of laws for Native Americans." *Id.*

In 2006, the South Dakota Equal Justice Commission issued its *Final Report and Recommendations* to the South Dakota Supreme Court ("*South Dakota Report*"), http://ujs.sd.gov/uploads/docs/Equal_Justice_Commission_Report.pdf, on perceptions of unfairness to Native Americans, *inter alia*, in the State's judicial system, including in criminal cases and in the jury system. Testimony before that Commission focused on disparities across the spectrum in criminal proceedings, including stops, arrests, legal representation and sentencing and strongly recommended investigation and action. See *South Dakota Report* at

1 (Native Americans perceive that the South Dakota "judicial system shows favoritism to non-minorities"); *id.* at 8 (finding that "[m]inority people have a general distrust of the criminal justice system and exclusion from being seated on juries fosters that distrust").

Finally, in 2007, the United States Commission on Civil Rights held hearings on the significant discrimination against Native Americans in regions of the country including Indian reservations. See, *e.g.*, U.S. Comm'n on Civil Rights, *Commission Briefing: Discrimination Against Native Americans in Border Towns* (Mar. 22, 2011), http://www.usccr.gov/pubs/BorderTowns_03-22-11.pdf. These hearings provide detailed testimony about the kinds of discrimination Native Americans face in such regions. See *id.* at 4-24 (summarizing testimony); *id.* at 25-45 (written statements).

In short, Native Americans have a demonstrated need for federal protection, including constitutional protection, from discrimination in the criminal justice system. The legitimacy of that system with respect to the Native American defendants and communities it governs will turn on its perceived equality of treatment and impartiality. Most Americans would agree with this Court's view that the Constitution forbids race discrimination to infect adjudication. But if a jury's guilty verdict against a Native American infected by express bias stands, Native Americans understandably will view the process as tainted.

In this case, jurors made discriminatory statements reflecting racial stereotypes that supported a conviction for sexual crimes, such as "I think he did it because he's Mexican and Mexican men take whatever they want." Pet. App. 4a-5a. This case

thus resembles the *Benally* case which involved analogous stereotyping of Native Americans. See *Benally*, 546 F.3d at 1231 (jury foreperson states that "'[w]hen Indians get alcohol, they all get drunk,' and when they get drunk, they get violent") (alteration in original). Yet in both cases, the courts decided that the Constitution's guarantee of an impartial jury had been fulfilled.

It is critically, and constitutionally, important that administration of criminal justice be free from discrimination against persons of all races, including Native Americans and other minorities. This Court should grant review to examine the Colorado court's view of the Sixth Amendment and ensure that it is consistent with this constitutional goal.

III. JURY VENIRES FOR FEDERAL CRIMES ARISING IN INDIAN COUNTRY GENERALLY DO NOT INCLUDE MEMBERS OF THE DEFENDANTS' INDIAN COUNTRY COMMUNITY.

The Sixth Amendment is framed as a guarantee of certain rights to criminal defendants, but this Court has made clear that it also serves the important interest of community participation in our criminal justice system. Thus, juries are "instruments of public justice" and must be "truly representative of the community." *Smith v. Texas*, 311 U.S. 128, 130 (1940). Our system "'presupposes a jury drawn from a pool broadly representative of the community.'" *Taylor v. Louisiana*, 419 U.S. 522, 530-31 (1975). See also *Glasser v. United States*, 315 U.S. 60, 85 (1942) (a representative jury is fundamental to the "basic concepts of a democratic society and a representative government").

As a practical matter, the residents of Indian country generally are not well represented in the jury venires or juries deciding Indian country cases. See generally K. Washburn, *supra* at 747-50. Indians constitute only a small percentage of any given state's population even in states with substantial Indian populations. *Id.* at 747 n.188. Jury venires are drawn from state voter registration rolls. While Indian voter participation in state elections is increasing, Indians, who are "among the poorest Americans," *id.* at 747 & n.189, and often focused on tribal rather than state government, are somewhat less likely than other state citizens to be registered to vote. *Id.* at 747-48 & nn.190-93.

Finally, and critically, most federal districts including Indian reservations are physically large – meaning that the courts are located in cities or towns hundreds of miles from Indian country. *Id.* at 748-50 & nn.194-95. The relatively impoverished residents of Indian country generally lack the resources to be jurors in courts hundreds of miles away.

Native American defendants are thus unlikely to have jury venires, let alone juries, that include any residents of Indian country. Instead, the jury venires are composed of state citizens. These individuals, like residents of Indian country, are U.S. citizens, but their legal status differs from that of Native Americans in significant ways. Cf. *Strauder v. W. Virginia*, 100 U.S. 308 (1879) ("the very idea of a jury is a body of men composed of the peers or equals of the person whose rights it is selected or summoned to determine; that is, of . persons having the same legal status in society as that which he holds").

Thus, an Indian who commits a crime in Indian country is very likely to be subject to a different legal regime than any member of his or her jury. See 18

U.S.C. § 1153. The crimes covered by the Major Crimes Act are quite serious, but they are "of a local nature with significant local effects and few effects beyond that locality." K. Washburn, *supra* at 762. Nonetheless, an Indian committing such a crime is subject to federal law and federal punishment, while a state citizen committing the same crime in a community governed by state law would face state and local criminal regimes.

NCAI is not alleging that jury pools in such regions are generally unconstitutionally constituted. NCAI's point is simply that, as a practical matter of geography, economics and local government affiliation, Indian defendants often are not tried by a jury of their peers or even a jury with members from their distinctive Indian country community. In most cases, jurors will not openly announce their biases at voir dire or in deliberations, even though unstated biases will affect deliberations and the administration of justice. But, significantly, the absence of Indian country denizens from a jury makes overt bias more likely and its discovery less likely. This situation presents a serious challenge to our criminal justice system. Where juror misrepresentations are made in voir dire and where jurors make openly biased statements during deliberations that are directly related to guilt, the defendant has not received a fair trial from an impartial jury and is entitled to a new trial untainted by racial bias.

CONCLUSION

For these reasons and those stated in the petition, the petition should be granted.

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Supreme Court of the United States

MIGUEL ANGEL PEÑA RODRIGUEZ,

Petitioner,

v.

STATE OF COLORADO,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE COLORADO SUPREME COURT

BRIEF FOR AMICI CURIAE PROFESSORS OF LAW IN SUPPORT OF PETITIONER

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27 Charles Alan Wright & Victor James Gold, *Federal Practice and Procedure* § 6074 (2d ed. 2007) 7, 9, 10

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INTEREST OF AMICI CURIAE

Amici are law professors who specialize in evidence and criminal law and procedure.[1] As legal academics, *amici* have an interest in the consistent and correct application of the rules of evidence, and in reconciling those rules with the constitutional right to a fair trial.

The brief is joined by the following professors:

Barbara Allen Babcock, Judge John Crown Professor of Law, Emerita, Stanford Law School.

Jeffrey Bellin, Cabell Research Professor of Law, William and Mary Law School.

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[1] Pursuant to Rule 37.6, *amici* affirm that no counsel or party authored this brief in whole or part. Duke University School of Law supports faculty research and scholarship, and that financial support contributed to the costs of preparing this brief. Otherwise, no person or entity apart from the *amici* and their counsel made any monetary contribution intended to fund the preparation or submission of this brief. Duke University is not a signatory to the brief, and the views expressed here are solely those of the *amici*. The parties' letters of consent to the filing of this brief have been filed with the Clerk's Office. Counsel of record received timely notice of the intent to file the brief.

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SUMMARY OF ARGUMENT

The petition raises the question whether the rules prohibiting juror impeachment should give way to constitutional concerns when a jury member comes forward with evidence of racially or ethnically biased statements made during deliberations about a criminal defendant's guilt. The question is an important one that has deeply divided both federal and state courts. See Pet. App. 23a n.4 (Marquez, J., dissenting).

Applying this Court's previous decisions on the scope of Rule 606(b) will not resolve the split in authority going forward. In two previous cases, the Court has not found fair trial concerns significant enough to override Rule 606(b), but it has left open the question at issue here. Both the substance and the structure of the juror statements made in this case distinguish it from this Court's earlier decisions. *Tanner v. United States*, 483 U.S. 107, 127 (1987), concerned juror competency rather than juror prejudice. In *Warger v. Shauers*, 135 S. Ct. 521 (2014), the Court addressed a juror's partiality in a matter "internal" to deliberations and ordinarily covered by Rule 606(b), but that case did not involve bigotry specifically directed at a criminal defendant. Moreover, the *Warger* decision noted that "[t]here may be cases of juror bias so extreme" that the no-impeachment rule could give way. 135 S. Ct. at 529 n.3. This Court should now recognize that explicit racial or ethnic prejudice against a criminal defendant falls into this category, resolving the existing conflict. The balance of interests is markedly different in such cases than in *Tanner* or *Warger*.

First, the fundamental unfairness of a guilty verdict tainted by racial prejudice raises particularly

acute constitutional concerns. In this case, the right to a fair criminal trial, its essential component of an impartial jury, and the grave threat to impartiality that racial or ethnic bias poses all converge. See *Wright v. United States*, 559 F Supp. 1139, 1151 (E.D.N.Y. 1983) ("If a criminal defendant could show that the jury was racially prejudiced, such evidence could not be ignored without trampling the Sixth Amendment's guarantee to a fair trial and an impartial jury."). Indeed, racial or ethnic prejudice against a defendant abridges the fair trial right almost "by definition." *Warger*, 135 S. Ct. at 529 n.3.

Second, juror testimony is likely to be the only available evidence to establish such prejudice. The "usual safeguards" this Court has pointed to in prior cases are not "sufficient to protect the integrity of the process" in cases of racial or ethnic bias. *Id.* Moreover, the administrability concerns that arise with general claims of juror dishonesty or partiality are not present in the narrower and clearer context of expressly racist considerations. The impairment in *Tanner* was also of a type that could be exposed through means other than reliance on juror testimony Intoxication may be observable during the trial and is a potential subject of testimony by non-jurors. Similarly, the kind of bias at issue in *Warger*—a juror's "views about negligence liability for car crashes" that resulted from a prior accident involving her daughter, *id.* at 529—is more likely to be discernable from external evidence or revealed during voir dire than racial or ethnic prejudice against a defendant.

Third, the experience of jurisdictions that have admitted juror testimony on the limited question of racial or ethnic bias suggests that consistently recognizing the exception will not unduly infringe on juror privacy or meaningfully burden the courts. The

concern about bigotry has some self-limiting mechanisms. Courts have continued to apply the no-impeachment rule unless statements are overtly racist, objectively verifiable, and focused on a criminal defendant's guilt or innocence. Furthermore, pursuant to Rule 606(b), courts already consider juror testimony on "extraneous prejudicial information" such as media accounts and "outside influences" such as threats and bribes. Although the statements of ethnic animus at issue in this case occurred "during the jury's deliberations" within the meaning of the rule, an additional constitutional exception can be administered just as the enumerated exceptions are. The initial factual question is an objective one: whether a racist comment pertaining to the case was uttered. In addition, with regard to a juror's racial or ethnic prejudice against a defendant, courts need not inquire into the statement's effect on internal mental processes in order to address the issue of a remedy.

Finally, the policy justifications for Rule 606(b) are not served by applying it in this context. Permitting verdicts tainted by racial or ethnic bias to remain in place in the interest of "finality" does profound harm to the criminal justice system. Moreover, public confidence in the "integrity" of adjudication declines when racial or ethnic prejudice comes to light but evidentiary rules bar its consideration. A criminal defendant's right to assert that the jury deliberations were racially tainted currently depends on the jurisdiction in which the case arises. Leaving potentially unconstitutional verdicts entirely "beyond effective reach" in some jurisdictions will only promote "irregularity and injustice." Fed. R. Evid. 606(b), Advisory Committee Note to subdivision (b). This Court has long recognized that there must be a measure of flexibility

in the no-impeachment rule because cases might arise in which its rigid application violates "the plainest principles of justice." *McDonald v. Pless*, 238 U.S. 264, 269 (1915); see also *Warger*, 135 S. Ct. at 529 n.3. The alleged prejudice at issue here presents such a case.

ARGUMENT

I. THE PARAMOUNT CONSTITUTIONAL CONCERN WITH RACIAL OR ETHNIC DISCRIMINATION AGAINST CRIMINAL DEFENDANTS SHOULD OVERRIDE THE EVIDENTIARY BAR TO IMPEACHMENT BY JUROR TESTIMONY.

This case arises at the intersection of the Sixth Amendment fair trial guarantee and the difficult and lasting problem of racial prejudice among jurors. Racial or ethnic bias is an "especially pernicious" form of prejudice in the criminal justice process to which this Court applies special scrutiny. *Rose v. Mitchell*, 443 U.S. 545, 555 (1979); see also *Georgia v. McCollum*, 505 U.S. 42, 58 (1992) (a defendant has "a right to an impartial jury that can view him without racial animus, which so long has distorted our system of criminal justice"); *Holland v. Illinois*, 493 U.S. 474, 511 (1990) (Stevens, J., dissenting) (noting the Court's "unceasing efforts to eradicate racial prejudice from our criminal justice system").

The Court has been vigilant, for example, about state-sponsored prejudice when prosecutors exercise peremptory challenges of jurors for racially discriminatory reasons. See *Batson v. Kentucky*, 476 U.S. 79, 88 (1986); see also *Miller-El v. Dretke*, 545 U.S. 231, 238 (2005) ("When the government's choice

of jurors is tainted with racial bias," then "the very integrity of the courts is jeopardized."); *Powers v. Ohio*, 499 U.S. 400, 411 (1991) ("The jury acts as a vital check against wrongful exercise of power by the State and its prosecutors. The intrusion of racial discrimination into the jury selection process damages both the fact and the perception of this guarantee.") (internal citation omitted).

The Court should be no less vigilant when allegations arise that overt racial or ethnic prejudice has tainted a jury's guilty verdict. *Cf. McCollum*, 505 U.S. at 62 (Thomas, J., concurring) (cautioning against "exalting the rights of citizens to sit on juries over the rights of the criminal defendant, even though it is the defendant, not the jurors, who faces imprisonment or even death"). Indeed, "the constitutional interests of the affected party are at their strongest when a jury employs racial bias in reaching its verdict." 27 Charles Alan Wright & Victor James Gold, *Federal Practice and Procedure* § 6074, at 513 (2d ed. 2007).

In this case involving sexual assault and harassment, a seated juror argued during deliberations that "Mexican men take whatever they want," Pet. App. 4a., that "Mexican men had a bravado that caused them to believe they could do whatever they wanted with women," *id.*, that "Mexican men [are] physically controlling of women because they have a sense of entitlement," *id.*, and that the juror's experience in law enforcement suggested that "nine times out of ten Mexican men were guilty of being aggressive toward women and young girls." *Id.*

The focused prejudice here represents a much more substantial defect in the proceedings than the

bias at issue in the *Warger* case. When partiality comes in the form of racial or ethnic prejudice, it "undermines the jury's ability to perform its function as a buffer against governmental oppression and, in fact, converts the jury itself into an instrument of oppression." Wright & Gold § 6074, at 513. Racial animus, moreover, raises particularly significant constitutional issues in criminal cases, which is a context that *Warger* did not present. See *Rose*, 443 U.S. at 563.

Federal Rule of Evidence 606(b), though otherwise applicable to the statements of jurors during deliberations, should yield to these constitutional concerns when it shields racially motivated factfinders. As this Court has previously stated, "no right ranks higher than the right of the accused to a fair trial," *Press-Enter. Co. v. Superior Court*, 464 U.S. 501, 508 (1984), and "the inestimable privilege of trial by jury" underlies "the whole administration of criminal justice." *Holland*, 493 U.S. at 511 (Stevens, J., dissenting). The guarantee of an impartial jury "goes to the very integrity of the legal system." *Gray v. Mississippi*, 481 U.S. 648, 668 (1987). Fundamental fairness depends on factfinders who are free from any "predisposition about the defendant's culpability." *Gomez v. United States*, 490 U.S. 858, 873 (1989). Jurors are not "impartial" in the "constitutional sense of that term" if they have "strong and deep impressions" that "close the mind against the testimony that may be offered in opposition to them." *United States v. Burr*, 25 F. Cas. 49, 51 (C.C.D. Va. 1807); see also *Parker v. Gladden*, 385 U.S. 363, 366 (1966) (per curiam) ("[P]etitioner was entitled to be tried by 12, not 9 or even 10, impartial and unprejudiced jurors"); *Aldridge v. United States*, 283 U.S. 308, 313 (1931) (A "gross

injustice" is perpetrated if a juror "entertain[s] a prejudice which would preclude his rendering a fair verdict."); *Strauder v. West Virginia*, 100 U.S. 303, 309 (1879) (Prejudices against "particular classes" that "sway the judgment of jurors" "deny to persons of those classes the full enjoyment of that protection which others enjoy.").

In construing the common law precursor to 606(b), the Court has held that the no-impeachment rule must be sufficiently pliable to accommodate the interests of justice. See *McDonald*, 238 U.S. at 269; see also *Clark v. United States*, 289 U.S. 1, 16 (1933); *United States v. Reid*, 53 U.S. 361, 366 (1851). This conclusion is consonant with the Court's broader jurisprudence about conflicts between fair trial rights and exclusionary rules. When evidentiary bars "insulate from discovery the violation of constitutional rights," they may "themselves violate those rights." Wright & Gold § 6074, at 513. Accordingly, the Court has also held that the rules of evidence must give way when they preclude "the meaningful opportunity to present a complete defense." *Holmes v. South Carolina*, 547 U.S. 319, 324, 331 (2006); see also *Green v. Georgia*, 442 U.S. 95, 97 (1979) ("In these unique circumstances, 'the hearsay rule may not be applied mechanistically to defeat the ends of justice.'") (quoting *Chambers v. Mississippi*, 410 U.S. 284, 302 (1973)); *Davis v. Alaska*, 415 U.S. 308, 320 (1974) ("The State's policy interest in protecting the confidentiality of a juvenile offender's record cannot require yielding of so vital a constitutional right as the effective cross-examination for bias of an adverse witness.").

When the Court balances competing interests to determine whether a defendant's fair trial rights should override an evidentiary exclusion, the central

question is whether "the interests served by a rule justify the limitation imposed on a defendant's constitutional right." *Rock v. Arkansas*, 483 U.S. 44, 56 (1987). The policy interests behind enforcement of Rule 606(b) are simply "at their weakest" in cases of jury bias involving racial prejudice. See Wright & Gold § 6074, at 513. Because racial or ethnic animus by jurors poses a particular danger to fair trial rights, the Rule 606(b) bar should not preclude consideration of juror testimony about the narrow category of statements expressly revealing such prejudice during deliberations.

II. THE SUPREME COURT'S DECISIONS ADDRESSING THE SCOPE OF EXCEPTIONS TO 606(B) WILL NOT RESOLVE THE CONFLICT CONCERNING JUROR TESTIMONY ABOUT RACIAL OR ETHNIC BIAS.

This Court's previous decisions declining to permit juror testimony on statements during deliberations depend on alternate mechanisms for revealing sources of unfairness that will not work effectively in instances of racial or ethnic bias. The *Tanner* Court envisioned safety valves through which alleged biases could still be revealed and addressed: surface protections like external observation and the voir dire process, as well as non-juror or pre-verdict evidence of misconduct. The Colorado Supreme Court, and those courts that have adopted a similar approach, have relied on these safeguards to conclude that the *Tanner* protections are "also available to expose racial biases." *United States v. Benally*, 546

F.3d 1230, 1240 (CA10 2008), *cert. denied*, 558 U.S. 1051 (2009).

Visual observation by the judge, counsel, or court personnel, however, can do little to bring racial or ethnic bias to light. Incompetence and prejudice reveal themselves differently. For example, non-jurors are unlikely witnesses to prejudicial statements about a defendant, even though they can often testify to misconduct like intoxication. Racial prejudice also lies especially well hidden. The bias at issue in *Warger*—a juror's sympathy with a defendant who had caused a car accident—might have been established through objective evidence about her personal history, or through statements that she made outside of the jury room. But evidence outside of the jury deliberations is unlikely to reveal a juror's racially discriminatory reaction to the evidence at trial. Although there could be indications of animus such as membership in certain groups, complaints involving other racial discrimination, or past behavior towards individuals of other races or ethnicities, those external signals would not necessarily link to invidious discrimination against a criminal defendant.

The voir dire process, moreover, is even less likely to uncover racial or ethnic prejudice in jurors. Voir dire questioning might expose incentives like the *Warger* juror's potential identification with the defendant because of her daughter's experience. Nothing inhibited the *Warger* juror from freely expressing her views about liability for car accidents during voir dire. When it comes to racial or ethnic bias, a juror can hardly be expected to acknowledge that he harbors some prejudice. A juror "may have an interest in concealing his own bias" or may even be "unaware of it." See *McDonough Power Equip., Inc. v.*

Greenwood, 464 U.S. 548, 558 (1984) (Brennan, J., concurring); see also Neil Vidmar & Valerie P Hans, American Juries: The Verdict 91 (2007); Maria Krysan, *Privacy and the Expression of White Racial Attitudes: A Comparison Across Three Contexts*, 62 Public Opinion Quarterly 506, 507-09 (1998) (describing experiments on social pressure to conform to norms against prejudice). "Some jurors will intentionally deceive the courts, perhaps because they are ashamed to admit attitudes that are socially unfashionable or even because they might welcome the chance to seek retaliation against a litigant." Barbara Allen Babcock, *Voir Dire: Preserving "Its Wonderful Power"*, 27 Stan. L. Rev. 545, 554 (1975). And "the more prejudiced or bigoted the jurors, the less they can be expected to confess forthrightly and candidly their state of mind in open court." *Id.*

Indeed, the present case provides a self-contained demonstration. During the voir dire process, prospective jurors were repeatedly asked routine questions about whether they could be "fair" and whether they had feelings "for or against" petitioner. Pet. App. 3a. No juror acknowledged any racial or ethnic bias. *Id.* Two of the seated jurors have since alleged that in the intimacy and relative familiarity of the jury room, and in the absence of authority figures and public scrutiny, a juror made repeated statements to the effect that the jury should convict the defendant "because he's Mexican." Pet. App. 4a. Overt bias was thus intertwined with the juror's view of the defendant's culpability. When a "grave" case such as this arises, the sole mechanism for addressing the bias is likely to be consideration of statements made during deliberations and brought to light by a juror after the verdict. *United States v. Villar*, 586 F.3d 76, 87 (CA1 2009).

Although courts applying Rule 606(b) to potential racial or ethnic bias point to the possibility that jurors can express concerns about deliberations prior to the verdict, that rarely occurs. See *Kittle v. United States*, 65 A.3d 1144, 1155 (D.C. 2013); *Commonwealth v. Laguer*, 571 N.E.2d 371, 376 (Mass. 1991). As in this case, jurors typically come forward only after a verdict is rendered. The surface protections set forth in *Tanner* thus will not suffice to protect Sixth Amendment rights because post-verdict juror testimony is likely to be "the only available evidence to establish racist juror misconduct." *Racist Juror Misconduct During Deliberations*, 101 Harv. L. Rev. 1595, 1596 (1988). Accordingly, when a criminal defendant proffers juror testimony pointing to a racially discriminatory verdict, courts should be permitted to consider that evidence.

III. A NARROW EXCEPTION FOR CONSIDERATION OF JUROR TESTIMONY ABOUT DISCRIMINATORY STATEMENTS AS TO A DEFENDANT'S GUILT OR INNOCENCE IS WORKABLE AND CONSONANT WITH EXISTING EXCEPTIONS TO 606(B).

A narrow constitutional exception to consider juror testimony on racial or ethnic bias will not meaningfully increase the burden on jurors or on courts. The jurisdictions adhering to the no-impeachment rule in cases of such bias express traditional concerns with undermining finality, disrupting privacy, and inviting juror harassment. But despite admission of impeachment in many courts, there has been no "barrage of postverdict

scrutiny of juror conduct." *Tanner*, 483 U.S. at 120-21. Many jurisdictions are already hospitable to juror impeachment on the question of racial or ethnic bias, and their experience suggests that the courts can readily sort and evaluate such claims when they arise. Three federal courts of appeals and seven state courts of last resort have held that no-impeachment rules should not preclude consideration of a juror's racially prejudiced statements offered to establish a violation of the constitutional right to a fair trial. See, e.g., *Kittle*, 65 A.3d at 1153 nn.9 &10. Permitting juror impeachment on these issues does not appear to have increased post-verdict juror harassment, has not opened the door to juror testimony beyond a subset of cases involving invidious discrimination directed at the defendant, and has not required courts to evaluate mental processes within the jury deliberations.

Jurors' post-trial interactions with counsel and investigators would be little altered by broader application of the constitutional exception. In states that recognize the exception, as in states that do not, juror contact rules and ethical canons already discourage parties from seeking juror statements after trial. The Colorado Code of Professional Conduct, for example, prohibits post-discharge communications with jurors that involve "misrepresentation, coercion, duress or harassment." Colo. R. Prof'l Conduct 3.5(c)(3). In fact, the present case arose because two jurors voluntarily expressed their misgivings about the deliberations. Rather than protecting the reporting jurors, a strict construction of the rule frustrated their efforts to expose the possibility of a tainted verdict.

Moreover, inherent limiting principles circumscribe the cases in which an exception for racist

statements would be applicable. Even the courts that have recognized a constitutional override in cases of alleged prejudice only hear testimony when the statements directly relate to the Sixth Amendment concern by implicating objective facts about the case. The Sixth Amendment issue arises when the juror's statements are linked with consideration of the defendant's guilt or innocence and "received and utilized by the jury in an evidentiary context." *Smith v. Brewster*, 444 F. Supp. 482, 490 (S.D. Iowa 1978). The scope of the constitutional exception is thus narrow. It applies only to specific racial or ethnic animus pertaining to the defendant and applied to the substance of the case. Accordingly, comments made by jurors to non-jurors, *Wright*, 559 F. Supp. at 1129, statements to non-deliberating jurors, *United States v. Shalhout*, 507 Fed. Appx. 201, 207 (CA3 2012), and offhand remarks after a verdict had already been reached, *Shillcutt v. Gagnon*, 827 F.2d 1155, 1158-59 (CA7 1987), have all been held inadmissible.

The statements in question must also be subject to corroboration. See *Perry v. Bailey*, 12 Kan. 539, 545 (1874) ("If one [juror] affirms misconduct, the remaining eleven can deny."). The California Evidence Code, for example, permits juror testimony about statements made during deliberations, but only with regard to statements that give rise to a presumption of misconduct just because they were uttered. See Cal. Evid. Code § 1150(a); *In re Stankewitz*, 40 Cal. 3d 391, 398 (1985). The California courts have rejected speculative claims or subjective impressions of prejudice. *Id.* In many jurisdictions that permit juror impeachment to address racial prejudice, courts have similarly declined to review statements of bias that do not relate to "specific readily identifiable facts or actions as opposed to

evidence of subjective mental attitudes on the part of a juror." *Laguer*, 571 N.E. 2d at 376; see also *United States v. Brassler*, 651 F.2d 600, 603 (CA8 1981); *People v. Holmes*, 372 N.E.2d 656, 659 (Ill. 1978). A constitutional exception to Rule 606(b) thus would only render testimony about racist statements admissible when that testimony can be proven or disproven. The objective verifiability of the evidence alleviates any concern with juror fraud or the possibility that a disgruntled juror could invent misconduct.

Furthermore, only overtly racist statements directed at the evidence—not stray remarks, insults exchanged between jurors, or even indications of general bigotry unrelated to the defendant—would render statements during deliberations admissible. See *Villar*, 586 F.3d at 87; *Shalhout*, 507 Fed. Appx. at 206-07. Despite the permissive approach to juror impeachment in the California rules, for example, courts there have held that the statements in question must constitute more than mere suggestions of racist thinking. See *People v. Steele*, 4 P.3d 225, 248 (Cal. 2002). Accordingly, courts have rejected testimony concerning general references to racial stereotypes during deliberations, as well as alleged statements equally applicable to gang membership or racial status. See *People v. Ali*, 2013 WL 452901, at *19 (Cal. Ct. App. Feb. 7, 2013).

These screening mechanisms are similar to the ones that courts use when confronted with allegations of external influences on jury deliberations, which are already admissible pursuant to Rule 606(b)(2). Granting review of evidence of racial or ethnic bias thus will not upset the existing balance between exposing juror misconduct and shoring up the finality and legitimacy of verdicts. As with allegations of

racially-tainted remarks, claims of external influence are subject to corroboration and refutation. The only initial question is whether the information was received or the influence occurred. Impact on the verdict is a separate inquiry

Faced, for example, with an allegation of bribery or receipt of extraneous information, a court first allows testimony to determine whether the act occurred. See, e.g., *Haugh v. Jones & Laughlin Steel Corp.*, 949 F.2d 914, 917 (CA7 1991) (proper procedure is to establish "whether the communication was made and what it contained" "without asking the jurors anything further and emphatically without asking them what role the communication played in their thoughts or discussion"). The same basic objective analysis applies when allegations arise that jurors made racially prejudiced statements. Courts need only determine "whether the communication was made and what it contained." *Id.* They make no subjective inquiry into the role that the communication played in deliberations.

Therefore, broader recognition of a constitutional exception would encompass only the objectively verifiable statements of a juror and would not require examination of the internal mental processes that Rule 606(b) was drafted to protect. See Fed. R. Evid. 606(b), Advisory Committee Note (the rule shields "mental operations and emotional reactions" during the jury's deliberative process); see also *Tobias v. Smith*, 468 F Supp. 1287, 1290 (W.D.N.Y. 1979) (allowing "objective evidence of matters improperly introduced and considered by the jury in its verdict"). Courts need not analyze the jury's actual reasoning process or engage in an ex post assessment of whether the jury was affected by the racist assertions.

This is so in evaluating a remedy for the violation as well as its existence. The issue of remedy is not before the Court, as the only question presented is whether the evidence of bias lies behind the 606(b) shield. Rule 606(b) clearly states that it "does not purport to specify the substantive grounds for setting aside verdicts for irregularity." Fed. R. Evid. 606(b), Advisory Committee Note. Under either of the approaches currently employed, however, the remedial step will not implicate the jury's reasoning process in deliberations.

Under one approach, many lower courts have concluded that the Sixth Amendment right is violated "if even one member of the jury harbors racial prejudice." *United States v. Booker*, 480 F.2d 1310, 1311 (CA7 1973). According to this view, proven racial bias on the part of a juror constitutes "a structural defect not subject to harmless error analysis." *State v. Phillips*, 927 A.2d 931, 934-36 (Conn. App. 2007); see also *State v. Santiago*, 715 A.2d 1, 20 (Conn. 1998) ("Allegations of racial bias on the part of a juror are fundamentally different from other types of juror misconduct because such conduct is, ipso facto, prejudicial."). That conclusion would be consistent with this Court's holding in *Gray* that jury impartiality is "so basic to a fair trial that [its] infraction can never be treated as harmless error." 481 U.S. at 668 (quoting *Chapman v. California*, 386 U.S. 18, 23 (1967)).

Under a second approach, whether or not to grant a new trial has generally turned on the "substantial likelihood that the alleged racial slur would have made a difference in the outcome." *Shillcutt*, 827 F.2d at 1158-59; see also *Commonwealth v. McCowen*, 939 N.E.2d 735, 765-66 (Mass. 2010). In making that determination about

remedy, courts confronting statements of racial bias have also looked to external indications like the jury's decision to acquit on some charges, *Shalhout*, 507 Fed. Appx. at 207, or overwhelming evidence of guilt that reduces concern about racial bias infecting a verdict. *Fields v. Woodford*, 309 F.3d 1095, 1006-07 (CA9 2002). Unlike the admissibility inquiry, which looks only to the objective existence of the racial or ethnic prejudice and the nature and timing of the statements in question, the remedial step accounts for extrinsic indications of the impact on the verdict.

This approach would involve the same burden-shifting framework that operates when there are allegations of extraneous prejudicial information under Rule 606(b)(2). See *United States v. Williams-Davis*, 90 F.3d 490, 497 (CADC 1996) (questioning whether there is a reasonable possibility that the outside intrusion affected the verdict). Once the defendant establishes, by a preponderance of the evidence, that the jury was exposed to racially biased statements that infected the judicial process, the burden shifts to the state to show that there was no prejudice. The judge then considers "the probable effect" of the statements "on a hypothetical average jury." *McCowen*, 939 N.E.2d at 766; see also, e.g., *Villar*, 586 F.3d at 87 (district court determined on remand that the verdict was not tainted by the racially discriminatory statements and could stand).

Petitioner would likely be entitled to a new trial in this case regardless of the remedial approach. The juror's statements were "directly tied to the determination of the defendant's guilt." Pet. App. 26a (Marquez, J., dissenting). A juror allegedly stated, on more than one occasion during deliberations, that he believed the defendant was guilty "because he's Mexican." Pet. App. 4a. Petitioner's case was close

and dependent on a problematic identification, and the jury indicated initial deadlock on all four charges. Moreover, the case turned in important respects on the credibility of an alibi witness whose testimony the juror at the center of this appeal discredited after (erroneously) labeling the alibi witness an "illegal." Pet. App. 4a-5a; Tr. 14 (Feb. 25, 2010).

The bias expressed here is severe, focused on the defendant's ethnicity, and clearly connected with consideration of the facts of the case. The trial court in fact acknowledged that the juror testimony exposed prejudice in the deliberations, but then ruled that the bias could not support a new trial because of the no-impeachment rule. Tr. 3 (July 20, 2010).

In future cases in which a defendant likewise proffers juror impeachment involving blatant expressions of racism inserted into jury deliberations as an argument in favor of guilt, every court should have access to the relevant testimony. There is no reason to think that jurors are forfeiting meaningful protections in such a case, or that courts are incapable of screening for legitimate constitutional claims.

IV. THE POLICIES SUPPORTING 606(B) ARE BEST SERVED BY ALLOWING JUROR TESTIMONY IN CASES OF ALLEGED RACIAL OR ETHNIC BIAS.

The Colorado Supreme Court's 4-3 decision in this case turned in large part on the policy implications of recognizing a constitutional exception to Rule 606(b). See Pet. App. 13a-15a. To be sure, the rule may give effect to concerns about intrusion into the jury room and public confidence in the finality of verdicts. Because of the nature of the statements at

issue, however, there are important institutional interests that counsel in favor of permitting inquiry into alleged statements of racial or ethnic prejudice. That inquiry could support not only the accuracy of criminal verdicts and the unbiased administration of justice, but also the integrity and legitimacy of the jury system as a whole.

Concern with "chilling" jury deliberations has no force when racist speech is at issue. In addition, jurors neither expect nor enjoy complete privacy. Rule 606(b) has always permitted non-juror testimony, as well as the use of pre-verdict statements. The rule further allows post-verdict testimony about external influences even by jurors, and it does not address juror revelations outside of court. "Juror journalism" and public discussion about jury service is not uncommon in high profile cases. The Colorado court's construction of the rule thus permits wide reporting in the public domain of racially prejudiced statements by jurors while precluding any redress in court.

Perhaps the strongest arguments favoring strict interpretation of Rule 606(b) concern the validity of jury decisionmaking itself, but those also lack force when weighed against the harm of racial or ethnic bias. It is true that jury discussions might, upon close scrutiny, fall short of ideals about the deliberative process. Jury perfection remains an "untenable goal." *Benally*, 546 F.3d at 1240. Racial prejudice is among the most dangerous of the jury's imperfections, however, and when it reveals itself openly, confronting the available evidence will do more to preserve the institution of the jury than ignoring it.

Indeed, the injury of racist factfinding is not limited to the criminal defendant deprived of a fair

trial. As this Court has recognized, prejudice causes injury "to the jury system, to the law as an institution, to the community at large, and to the democratic ideal reflected in the process of our courts." *Rose*, 443 U.S. at 556. A rigid interpretation of Rule 606(b) in the face of allegations of racial or ethnic bias affects not only the fundamental fairness of the trial but the appearance of fairness in the public eye. See *McCollum*, 505 U.S. at 49 ("One of the goals of our jury system is to impress upon the criminal defendant and the community as a whole that a verdict of conviction or acquittal is given in accordance with the law by persons who are fair."); *Batson*, 476 U.S. at 87 (stating that the "harm from discriminatory jury selection extends beyond that inflicted on the defendant and the excluded juror to touch the entire community" and "undermine public confidence in the fairness of our system of justice").

When a decision is based on bigotry, removing the deliberations from the court's purview does nothing to preserve the integrity of the jury. Both defendants and society may become aware of express juror prejudice through post-trial disclosures, and then look to the court to determine the constitutional significance of that bias. Only in some jurisdictions does that assessment occur, however, and this Court should resolve the split and ensure consistent consideration of juror testimony as to racially biased statements by jurors about a criminal defendant's guilt.

If "'smoking guns' are ignored, we have little hope of combating the more subtle forms of racial discrimination" in the criminal justice system. *Wilkerson v. Texas*, 493 U.S. 924, 928 (1989) (Marshall, J., dissenting). Although this Court has recognized that the jury system might not survive

"efforts to perfect it," *Tanner*, 483 U.S. at 120, neither can it survive efforts to protect it by shielding racial prejudice from review.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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IN THE

Supreme Court of the United States

MIGUEL ANGEL PEÑA RODRIGUEZ,

Petitioner,

v.

STATE OF COLORADO,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE COLORADO SUPREME COURT

BRIEF OF *AMICI CURIAE* RETIRED JUDGES IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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INTEREST OF *AMICI*

Amici are judges who served on either the Massachusetts state courts or the federal courts of Massachusetts. As judges they presided over jury trials and addressed issues similar to those raised in the case at bar.[1]

Judge Rudolph Kass served as an Associate Justice of the Massachusetts Appeals Court from 1979 to 2003. Since retirement from the court, Judge Kass has served on the alternate dispute resolution panels of The Mediation Group, Org., in Brookline MA, and REBA Dispute Resolution, in Boston, MA. He is a member of the Board of Directors of Jewish Community Housing for the Elderly and Law Advocacy Resources, Inc., which delivers legal assistance to persons of low income and sometimes no income. Judge Hiller Zobel was an Associate Justice of the Massachusetts Superior Court from 1979 to 2002. Judge Zobel was also a tenured professor of law at Boston College Law School where he taught courses on civil procedure, evidence, copyright, admiralty, trial practice and judicial process. He presently serves as a neutral for Resolutions, LLC. Judge Margaret Hinkle was an Associate Justice of the Massachusetts Superior

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[1] Counsel of record for all parties received notice of the *amici curiae*'s intent to file this brief. The parties' letters of consent to the filing of this brief have been filed with the Clerk. Further, *amici curiae* states that no counsel for a party has authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity, other than the *amici curiae*, or its counsel, has made a monetary contribution to this brief's preparation or submission.

Court from 1993 to 2010 and on recall until February 2011. She presently serves as a neutral for JAMS and a Special Master for the Massachusetts Superior Court. Judge Nancy Gertner served on the United States District Court for the District of Massachusetts from 1994 to 2011. She retired to become Professor of Practice at the Harvard Law School, from 2011 to 2014 teaching criminal law, criminal procedure, and sentencing. She presently teaches part time at Harvard and is a neutral with Resolutions, LLC.

SUMMARY OF THE ARGUMENT

Direct evidence of unequivocal racial bias expressed by a juror during deliberations raises serious constitutional questions about whether the defendant had the benefit of a fair and impartial jury. "No impeachment" rules that bar consideration of juror testimony of racial bias during deliberations when that testimony is offered to challenge a verdict go too far in undermining Sixth Amendment rights. While there are valid concerns about post-verdict inquiries into the jury's deliberation process, pragmatic issues must give way to constitutional requirements. *Amici*, retired state and federal judges from Massachusetts, a state without such a "no impeachment" rule since 1991, can attest that such pragmatic concerns can be addressed by court rules concerning lawyer-juror contact and decisional law.

In its opinion, the Colorado Supreme Court expressed three concerns regarding allowing investigations into jurors' racial bias: (1) that it would cause lawyers to harass jurors in an effort to uncover such information; (2) that courts would be

unable to "discern a dividing line between different types of juror bias" or between racially biased comments of varying "severity"; and (3) that such inquiries would shatter public confidence in the judicial system.

Many other states, including the Commonwealth of Massachusetts permit such inquiries. These states have ethical rules allowing investigation into jurors' racial bias while still preventing juror harassment. Trial courts in such states have the discretion to evaluate the significance of evidence of juror bias, and determine the appropriate remedy. The concerns expressed by the Colorado Supreme Court have not been reflected in the concrete experience of this Commonwealth or other states with a "no impeachment" rule. And rather than undermining public confidence in the judicial system, inquiries into racial bias during jury deliberations enhance it.

ARGUMENT

I. STATES THAT ALLOW INQUIRIES INTO JUROR BIAS STILL PROTECT JURORS FROM ATTORNEY HARASSMENT.

The Colorado Supreme Court expressed concern that allowing testimony regarding juror racial bias would cause lawyers to harass jurors. Pet. App. 13a-14a. Yet, many states allow inquiries into the jurors' deliberations process when allegations of racial bias surface, while still protecting jurors from attorney harassment.

For instance, Massachusetts has allowed post-verdict inquiries into the juror deliberations process

since 1991. *See, e.g.*, *Commonwealth v. Laguer*, 571 N.E.2d 371, 375–77 (Mass. 1991) (concluding that a defendant is entitled to a hearing investigating the truth or falsity of a juror's affidavit attesting to "countless racial slurs . . . made in the presence of the jury" that may have deprived defendant of his fundamental right to a trial by an impartial jury); *Commonwealth v. McCowen*, 939 N.E.2d 735, 765–66 (Mass. 2010) (a post-verdict inquiry based on affidavits from a discharged juror and two other deliberating jurors that the jury's deliberations had been infected by racial prejudice). At the same time, a juror is protected from lawyer harassment through an ethical rule forbidding the lawyer from engaging in post-verdict communications with jurors when the juror makes known his or her desire not to communicate with the lawyer. Mass. R. Prof'l Conduct 3.5(c)(2). Indeed, jurors are instructed, both before trial (in the Trial Juror's Handbook)[2] and after trial (in jury instructions), that they are under no obligation to disclose anything about their deliberations to either the media or to counsel.[3] In

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[2] *See* COMMONWEALTH OF MASS., OFF. OF JURY COMM'R, TRIAL JUROR'S HANDBOOK (July 2012), http://www.mass.gov/courts/docs/jury/trial-juror-handbook-2012-07-03.pdf.

[3] Massachusetts only recently adopted this more permissive rule, replacing its prior rule which prohibited all lawyer-initiated juror contact unless specifically authorized by court order. *See* former Mass. R. Prof'l Conduct 3.5(d) (no longer effective as of July 1, 2015); *see also Commonwealth v. Solis*, 407 Mass. 398 (1990); *Commonwealth v. Fidler*, 377 Mass. 192 (1979). Significantly, when Massachusetts considered liberalizing this rule, none of the issues regarding juror harassment raised by the Colorado court were raised. *See, e.g.*, STANDING ADVISORY COMM., REP. OF THE STANDING ADVISORY COMM. ON THE R. OF PROF'L CONDUCT 27–28 (July 1, 2013),

effect, they are encouraged to make clear whether or not they wish to speak to anyone post-verdict and counsel are obliged to respect their wishes.

Similarly, the Minnesota Supreme Court permits the trial court to hold a hearing whenever there is evidence of juror misconduct. *Schwartz v. Minneapolis Suburban Bus Co.*, 104 N.W.2d 301 (Minn. 1960). And Minnesota allows such '*Schwartz* hearings in response to allegations of racial bias on the part of a juror. *See, e.g.*, *State v. Evans*, 756 N.W.2d 854, 859 (Minn. 2008) (noting that, following a telephone caller's tip that a juror was racially biased, the trial court granted a *Schwartz* hearing to investigate the juror's misconduct). To prevent juror harassment Minnesota forbids a defeated litigant's attorney from contacting jurors for the purpose of obtaining evidence to request a *Schwartz* hearing. *Olberg v. Minneapolis Gas Co.*, 191 N.W.2d 418, 424–25 (Minn. 1971). To further discourage improper attorney behavior, the Minnesota Supreme Court strongly encourages trial courts to deny petitions for *Schwartz* hearings in instances where the defeated party's counsel obtains information from jurors in violation of *Olberg*. *Baker v. Gile*, 257 N.W.2d 376, 377–78 (Minn. 1977).

In short, the record in jurisdictions with a no-bar juror impeachment rule—as in Massachusetts and Minnesota—makes clear that the concerns of the

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http://www.mass.gov/courts/docs/sjc/docs/rules-professional-conduct-report.pdf.

Colorado Supreme Court can be addressed by ethical rules, juror handbooks, and court instructions.[4]

II. A DISCERNABLE LINE CAN BE DRAWN.

The Colorado Supreme Court asserted a concern that they would be unable to "discern a dividing line between different types of juror bias" or between racially biased comments of varying "severity." Pet. App. 14a-15a. Yet, Massachusetts courts have drawn such lines without difficulty. The Court confronting allegations of racist statements is obliged to determine the "precise content and context of the statement to determine whether it reflects the juror's actual racial or ethnic bias, or whether it was said in jest or otherwise bore a meaning that would fail to establish racial bias." *Commonwealth v. McCowen*, 939 N.E.2d 735, 765 (Mass. 2010). If the court determines the statement reflects the juror's bias, the defendant is entitled to a new trial, without a further inquiry as to whether that bias affected the verdict. *Id.* Even if the court determines that juror is not actually biased, the court still conducts an inquiry into the deliberative process to determine whether the juror's statements "so infected the

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[4] Colorado's rule is almost identical to Massachusetts', prohibiting a lawyer from communicating with a juror after discharge of the jury if "the juror has made known to the lawyer a desire not to communicate." Colo. R. Prof'l Conduct 3.5(c)(2). Likewise, Colorado attorneys are forbidden from engaging in post-verdict juror communications if those communications involve "misrepresentation, coercion, duress or harassment." Colo. R. Prof'l Conduct 3.5(c)(3). Thus, even if Colorado allowed inquiries into juror racial bias, Colorado jurors are protected from attorney harassment.

deliberative process" as to compromise the defendant's right to a fair trial. *Id.*

Other states have likewise identified meaningful standards for evaluating the impact of racist comments in the jury room without great difficulty. For example, in *Powell v. Allstate Insurance Co.*, 652 So.2d 354, 355 (Fla.1995), the Florida Supreme Court addressed claims of racial bias after a juror contacted the defendant's counsel and informed defense counsel of other jurors' numerous racial jokes throughout the trial. The Florida court drew a bright line. First, it noted that "it would be improper, after a verdict is rendered, to individually inquire into the thought processes of a juror to seek to discover some bias in the juror's mind, like the racial bias involved here." *Id.* at 357. Then, however, the court explained that investigations into juror misconduct are acceptable "when appeals to racial bias are made openly among the jurors." *Id.* Though the court recognized this line might not prevent improper bias from existing as a *silent* factor in a particular juror's mind, it would, hopefully, act as a check on such bias and prevent the bias from being expressed so as to overtly influence others. *Id.* at 357–58.

III. INVESTIGATING JUROR BIAS PROMOTES PUBLIC CONFIDENCE IN THE NOTION OF A TRIAL BY AN IMPARTIAL JURY.

The Supreme Court of Colorado further wrote that allowing investigations of allegations of racial bias in the jury deliberations process would "shatter public confidence in the fundamental notion of trial by jury." Pet. App. 13a. Yet, when a juror injects

racist statements into the deliberative process, the failure to conduct such an inquiry—to even consider the statement—has an even more deleterious impact. In fact, it is precisely because "juror bias affects the essential fairness of the trial" that Massachusetts grants a new trial to any defendant who establishes that the juror's statement reflects actual bias, without showing that the bias affected the jury's verdict. *Commonwealth v. McCowen*, 939 N.E.2d at 765 (internal citation omitted). Massachusetts recognizes that the public interest in holding a truly fair trial is more important than defending the idea that every trial must be fair.

Again, Massachusetts is not alone. *See, e.g., State v. Jones*, 09-0751 (La. App. 1 Cir. 10/23/09), 29 So. 3d 533, 540 (La. Ct. App. 2009) (vacating the defendant's conviction and sentence after finding that the trial judge erred in failing to properly investigate a juror's racial slur); *People v. Rivera*, 759 N.Y.S.2d 136, 137 (N.Y. 2003) (ordering a new trial after three jurors admitted hearing a fourth juror make a racial slur regarding the defendant and his guilt); *Marshall v. State*, 854 So. 2d 1235, 1241 (Fla. 2003) (per curiam) (remanding the case for an evidentiary hearing on the claim of juror bias after a juror alerted defense counsel to other jurors' racist jokes); *Wright v. CTL Distribution, Inc.*, 650 So. 2d 641, 643 (Fla. Dist. Ct. App. 1995) (finding that the trial court erred in not investigating a juror's post-verdict statement regarding another juror's racial slurs); *After Hour Welding Inc. v. Laneil Management Co.*, 324 N.W.2d 686, 690 (Wis. 1982) (determining that a juror was competent to testify as to anti-Semitic statements made by other jurors concerning defendant's witness since those

statements were "extraneous prejudicial information").

Colorado's concern that investigations into jury misconduct will undermine confidence in the judicial system is unfounded. Where even a single juror expresses racist sentiments, "[l]etting the verdict go unchallenged would be a serious affront to notions of equity." Victor Gold, *Juror Competency to Testify That A Verdict Was the Product of Racial Bias*, 9 ST. JOHN'S J. LEGAL COMMENTARY 125, 139 (1993).

CONCLUSION

There are important policy considerations underlying Fed.R.Evid. 606(b) as well as the Colorado Supreme Court's decision barring juror testimony on racist statements. *See e.g., United States v. Villar*, 586 F.3d 76, 83 (1st Cir. 2009), Where, as here, there is direct evidence of bias, where the record shows that bias was expressed to the other jurors, pragmatic concerns must give way to concerns about a fair and impartial jury. An absolute exclusion in situations such as the one at bar is constitutionally unacceptable.

In any case, as the experience in Massachusetts and other states suggests, the concerns reflected in Rule 606(b) and in the decision of the Colorado Supreme Court are overstated.

We urge the Court to grant *certiorari*.

Respectfully submitted,

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Dated: January 7, 2016

No. 15-606

IN THE

Supreme Court of the United States

MIGUEL ANGEL PEÑA RODRIGUEZ,

Petitioner,

v.

STATE OF COLORADO,

Respondent.

On Writ of Certiorari to the Colorado Supreme Court

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED NOVEMBER 10, 2015
CERTIORARI GRANTED APRIL 4, 2016

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DISTRICT COURT
ARAPAHOE COUNTY, COLORADO

CASE NO. 07CR2311

RELEVANT DOCKET ENTRIES

DATE	DOCKET TEXT
08/03/2007	Affidavit For Arrest Warrant Felony Complaint Filed With Affidavit For Arrest Warrant By DA /HLS
09/11/2009	Minute Order: Parties announce ready 4 day trial. Will call/May call; Exhibit list due 9/18. Voir Dire: 45 minutes. Opening statements: 20 minutes. One alt: #6. Defense objects to juror questions—overruled by court. Matter recalled Defense willing to toll speedy (court has 2 cases announce ready) speedy 4/5/10. JTRL reset on 2/23/10 at 8:30. Trial call on 2/12/10 at 11:00 /NJA
02/23/2010	Minute Order: Jury Trial Day 1. Judge: Antrim for Judge Wheeler. Clk: AJB. Rpter: C. Troyanek. Motion in Limine: No reference to DUI but statements by DEFT about drinking will be allowed. Jury Selection. Case is recalled after lunch and jury selection continues. Jury is selected at 2:45 pm. Matter moved to Div. 206 Judge Wheeler presiding. Opening statements. /AJB

DATE	DOCKET TEXT
02/24/2010	Minute Order: Jury Trial Day 2. Judge: Wheeler Clk: AJB Rpter: B. Sloan. Present: DDA Krusey; DEFT on bond w/attys M. Meyrick/K.Cherry. PPL Call: [J.C.]; [Ch.M.]; [Ca.M.] Jury adjourned for lunch. [Ca.M.] recalled. Timothy Murphy Deputy Chris Gulli Deputy Jeremy Nesvuld Deputy Rick Haight /AJB
02/25/2010	Minute Order: Jury Trial Day 3. Judge: Wheeler Clk: AJB Rpter: B.Sloan. Present: DDA Krusey; DEFT on bond w/attys M. Meyrick / K.Cherry. Parties discuss jury instructions. DEF mtn for judgment of acquittal. Court denies. Parties make objections to jury instructions. DEF calls: Mr. Chavez / AJB Court reads jury instructions Closing arguments. Jury adjourns for deliberations at 1130A Jury excused for the day and will return tomorrow at 830AM /AJB
02/26/2010	Minute Order: Jury Trial Day 4. Judge: Wheeler Clk: AJB Rpter: B. Sloan Present: DD Krusey; DEFT on bond w/attys M. Meyrick / K.Cherry Jury returns for deliberations at 830AM. Jury question – Jury is hung. Court gives modified Allen instruction. Jury has reached a decision on 3 of the 4 counts at 4:00 COUNT 1-ATTEMPT SEX ASSAULT, F5-MISTRIED

DATE	DOCKET TEXT
	COUNT 2-SEXUAL CONTACT-NO CONSENT, M1-GUILTY COUNT 3-HARASSMENT, M3-GUILTY COUNT 4-HARASSMENT, M3-GUILTY Presentence report ordered. Matter set for sentencing on the MISD Counts on 5/3/10 at 8:30. DEF to remain on bond with consent of surety. Due to time of day—Court accepts verbal consent. Written consent to be filed by 3/1/10 FOTH: ROCP Jury instructions Verdict forms Jury questions /NJA
03/11/2010	Motion ATY/Meyrick, Michael William DEF/RST/ Pena-Rodriguez, Miguel Angel Motn For Jury Contact Info And Motn For Extension Of Time For A New Trial Under Rule 33 Std 206 3/11/10 /HLS
03/12/2010	Order Order Re Deft's Motion For Jury Contact And For Enlargement Of Time For Motion For New Trial-preliminary Order. Copy Of Order To DA And M Meyrick /NJA
03/23/2010	Motion ATY/Meyrick, Michael William DEF/RST/ Pena-Rodriguez, Miguel Angel Motn For Disclosure Of Jury Info Std 206 3/31/10 /HLS
04/16/2010	Response People's Response To Defendant's Motn For Disclosure Of Jury Information Std 206 4 23 10 /SAH

DATE	DOCKET TEXT
04/28/2010	Order Order Re Deft's Motion For Disclosure Of Jury Information-1. Copy of Written Order To Da And Defense Csl Meyrick /NJA
05/03/2010	Minute Order: Sentencing. Judge: Wheeler Clk: AJB Rpter: B. Sloan Present: DDA Krusey; DEFT on bond w/attys M. Meyrick and K. Cherry Court provides juror information to K. Cherry. DEF CNSL moves to continue sentencing due to appellate deadline. Matter still outstanding is the motion for new trial. Court order sets out specific methods for fact finding. PPL do not object to continuance but makes a record regarding juror contact. By DEF CNSL. Court explains that the first stage of order is a fact finding matter. Matter set for status: 6/3/10 at 8:30A. Bond continues. FLG: Setting slip /AJB
06/01/2010	Filing Other DEF1/Pena-Rodriguez, Miguel Angel Submission Of Affidavits /FLN
06/03/2010	Minute Order: Status Conf. Judge: Wheeler Clerk: NJA J. Scott-Reporter Present: Kursey-DDA; DEFT with CSL Michael Meyrick and K. Cherry DA to file response brief by 6/11/10 (end of day); reply brief due by 6/16/10. Matter set for continued status 6/24/10 at 8:15. DEFT's bond continued /NJA

DATE	DOCKET TEXT
06/24/2010	Minute Order: Status Conf. Judge: Wheeler Present: Kursey-DDA; DEFT on bond with CSL M. Meyrick / K. Cherry Court has received affidavits from jurors and briefs from CSL. Court will issue written order. Matter set for further HRG on 7/20/10 at 1:30 for 1 HR. Bond continued FOTH: Setting slip /NJA
07/19/2010	Order Order Re Deft's Motion For Disclosure Of Jury Information III /NJA
07/20/2010	Minute Order: Status. Judge: Wheeler Clerk: NJA R. Sloan-Reporter Present: Kursey-DDA; DEFT with CSL M. Meyrick / K. Cherry After discussion with CSL, court will contact juror and ask that he come in on 8/12/10 at 8:30. Bond continued. /NJA
08/12/2010	Minute Order: Hearing. Judge: Wheeler Clk: AJB Rpter: B. Sloan Present: DDA Edson; DEFT on bond w/M. Meyrick / K. Cherry Juror [H.C.] has been subpoenaed. Court outlines course of questioning. The only issue will be why he did not disclose his previous law enforcement experience. Mr. [C.] sworn in. Court questions witness. DEF CNSL questions witness. Witness released. DEF CNSL will submit a written supplement due 9/3/10. /AJB

DATE	DOCKET TEXT
09/07/2010	Filing Other ATY / Meyrick, Michael William Defendant's Brief In Support Of Motion For A New Trial Std 206 9 9 1- /SAH
09/24/2010	Response People's Response To Defendant's Brief In Support Of His Motion For A New Trial Std 206 9 27 10 /SAH
09/30/2010	Order Order Re: Defendant's Motion For A New Trial-final Order. Based On Factual Analysis, The Court Denies The Deft's Motion For A New Trial. /MS
11/23/2010	Minute Order: Sentencing. Judge: Wheeler Clerk NJA R. Sloan – Reporter Present: J. Edson-DDA; DEFT with CSL Meyrick / Cherry DEFT previously found Guilty after Trial as to Count 2-Sexual Contact-No Consent 18-3-404, M1; Count 3 Harassment 18-9-111(1)(a), M3 and Count 4 Harassment 18-9-111(1)(a), M3. Count 1 Sex Assault on Child 18-3-405, F4 (Jury hung on this Count) – DA will dismiss Count 1. Defense CSL is requesting a stay until ruling from Court of Appeals – DA objects to request. Court will proceed to sentencing today. Court will sentence the DEFT as follows: As to Count 2 – DEFT sentenced to 2 years probation As to Counts 3 and 4 DEFT sentenced

DATE	DOCKET TEXT
	to 2 probation counts 2, 3, 4 all run concurrent Conditions: Attend & complete programs on sexual boundary violations, dynamics of consenting and non consenting relationships, impact of alcohol use on sexual behavior and education RE how the assault impacted the victim through empathy training and Victim harm recognition, no contact with Victims or their families; no contact with female children under 18 year (not including DEFT's child) unless and until approved by treatment provider and Probation; no limitation on contact with male children; abstain alcohol and illegal drugs; alcohol eval and treatment as recommended. Register as sex offender; genetic marker testing (if required for registration); no requirement of "no denial." Sex offender surcharge. No objection to transfer of probation to Denver. DEFT to report to Probation. FOTH: ROCP Presentence Report (Sealed) /NJA

COLORADO COURT OF APPEALS

CASE NO. 2011CA34

RELEVANT DOCKET ENTRIES

DATE	DOCKET TEXT
01/10/2011	Notice of Filing Notice of Appeal
11/17/2011	Opening Brief
05/31/2012	Answer Brief
07/16/2012	Reply Brief
11/08/2012	Opinion Issued – Mandate Pending

COLORADO SUPREME COURT

CASE NO. 2013SC09

RELEVANT DOCKET ENTRIES

DATE	DOCKET TEXT
01/04/2013	Petition for Writ of Certiorari
08/19/2013	Order of Court Granting Petition for Writ of Certiorari
09/29/2013	Opening Brief
04/14/2014	Answer Brief
05/27/2014	Reply Brief Motion or Request – Oral Argument Motion or Request – Excess Pages
05/18/2015	Opinion
06/10/2015	Petition for Rehearing
06/15/2015	Order of Court Denying Rehearing

COMPLAINT AND INFORMATION

CHARGES

COUNT 1: SEXUAL ASSAULT ON A CHILD – VICTIM LESS THAN 15, 18-3-405(1) (F4) [04041]

COUNT 2: UNLAWFUL SEXUAL CONTACT – NO CONSENT, 18-3-404(1)(a) (M1) [04121]

COUNT 3: HARASSMENT – STRIKE, SHOVE OR KICK, 18-9-111(1)(a) (M3) [27101]

COUNT 4: HARASSMENT – STRIKE, SHOVE OR KICK, 18-9-111(1)(a) (M3) [27101]

COUNT 5: DRIVING UNDER THE INFLUENCE, 42-4-1301(1)(a) (M) [73121]

Warrant Requested Bond requested: $6000

Bond set at: $10,000 CSP

Judge: /s/ [Illegible] 8/3/07
Signature Date

[District Court Seal]

Carol Chambers, District Attorney for the Eighteenth Judicial District, of the State of Colorado, in the name and by the authority of the People of the State of Colorado, informs the court of the following offenses committed, or triable, in the county of Arapahoe.

COUNT 1: SEXUAL ASSAULT ON A CHILD – VICTIM LESS THAN 15 (F4)

On or about May 13, 2007, MIGUEL ANGEL PENA-RODRIGUEZ unlawfully, feloniously, and knowingly subjected [Ca.M.], not his spouse, to sexual contact

and the victim was less than fifteen years of age and the defendant was at least four years older than the victim; in violation of section 18-3-405(1), C.R.S.

COUNT 2: UNLAWFUL SEXUAL CONTACT – NO CONSENT (MI)

On or about May 13, 2007, MIGUEL ANGEL PENA-RODRIGUEZ unlawfully and knowingly subjected [J.C.] to sexual contact, and the defendant knew the victim did not consent; in violation of section 18-3-404(1)(a), C.R.S.

COUNT 3: HARASSMENT – STRIKE, SHOVE OR KICK (M3)

On or about May 13, 2007, MIGUEL ANGEL PENA-RODRIGUEZ, with intent to harass, annoy, or alarm [Ca.M.], unlawfully struck, shoved, kicked, touched, or subjected the victim to physical contact; in violation of section 18-9-111(1)(a), C.R.S.

COUNT 4: HARASSMENT – STRIKE, SHOVE OR KICK (M3)

On or about May 13, 2007, MIGUEL ANGEL PENA-RODRIGUEZ, with intent to harass, annoy, or alarm [J.C.], unlawfully struck, shoved, kicked, touched, or subjected the victim to physical contact; in violation of section 18-9-111(1)(a), C.R.S.

COUNT 5: DRIVING UNDER THE INFLUENCE (M)

On or about May 13, 2007, MIGUEL ANGEL PENA-RODRIGUEZ unlawfully drove or operated a motor vehicle while under the influence of alcohol or drugs or both; in violation of section 42-4-1301(1)(a), C.R.S.

All offenses against the peace and dignity of the People of the State of Colorado.

Carol Chambers
District Attorney,
By /s/ [Illegible], # 30949
Deputy District Attorney

ROGER LANDEIS, being duly sworn upon oath says:

That the facts stated in the foregoing felony complaint/information, hereto attached are true and that the offenses therein charged were committed of this affiant's own personal knowledge.

/s/ Roger Landeis
ROGER LANDEIS

Juror Questionnaire – Please Print Answers

You will help save time selecting a jury when you complete this questionnaire completely and accurately. Do not show this questionnaire to anyone or discuss it with other jurors. If you need more space for your answers, please ask for an additional sheet of paper. Do not write on the back of the questionnaire. The completed questionnaire is NOT A PUBLIC RECORD. Press hard to imprint on all 3 copies.

1. Your full name: [H.L.C.]
2. Area of Denver you are from: Aurora
3. Where were you born and raised? Denver
4. Marital Status? M Number of children? 2 Children's ages and occupations: 41 – Educator 39 – Crafts
5. Employment (former employment if retired): Contracts
6. Spouse's employment (former employment if retired): Educator
7. Your level of education, including any legal training you may have had: Post Grad
8. Friends or relatives in law enforcement? Friends
9. Have you or a family member ever had a good or bad experience with a police officer? No If yes, please explain:
10. Have you ever been a witness in court? Yes When/type of case: 1992 Civil

11. If you have been a juror before, what type of case was it? Yes Traffic

12. Have you or anyone you know, ever been accused/convicted of a crime or a victim of a crime? Yes If yes, please explain: Daughter – No registration or insurance

13. Have you, or anyone you know ever been the victim of or accused of incest, sexual assault, or rape? Were children involved? No

    If yes, please explain.

14. If your answer to #13 needs to be further discussed, would you prefer to discuss this matter in private with the Judge and attorneys?

15. Do you have any specialized knowledge in the area of sexual assault/abuse, including any groups, associations that assist persons in this area? No If yes, please explain.

16. Would your answers to questions 12, 13 and/or 15 impact your ability to serve on a jury in a case, which may involve an allegation of sexual assault? No If yes, please explain.

17. Is there anything about you that you feel would make it difficult for you to be a fair juror in this case? No If yes, please explain.

18. Further information you would like to add:

    I swear or affirm that the above information is true to the best of my information and belief.

    s/ [H.L.C.]
    Juror name:

COURT REPORTER'S TRANSCRIPT
February 23, 2010

The Trial in this matter commenced at 8:39 a.m. on Tuesday, February 23, 2010, before the HONORABLE MARILYN K. ANTRIM, Judge of the District Court, and a jury of twelve.

This is a partial transcript of the proceedings in the above-named matter conducted on this date.

APPEARANCES

FOR THE PEOPLE: AMANDA K. KRUSEY, ESQ.
Registration No. 41094

FOR THE DEFENDANT: MICHAEL W. MEYRICK, ESQ.
Registration No. 29748

KELLY C. CHERRY, ESQ.
Registration No. 40105

* * *

[7] MS. KRUSEY: Your Honor, I actually just have a procedural question. I have never done a trial in front of Your Honor, so just the Court's preference as to–

THE COURT: Yes, we should talk about several things. What's your question?

MS. KRUSEY: Just during the jury selection, if we do want to make a challenge for cause, how the Court prefers us to do that. I know some judges prefer to wait until the [8] end of our voir dire, or if we do it

immediately. I know some judges don't like to tip off other jurors what's going to get them off.

THE COURT: After you have finished your voir dire, you and whoever is going to be doing voir dire for Defense will come forward. I'll ask if you have any challenges for cause. We do this on the record, so there will be a contemporaneous record filed. And then we'll address the issue, or I may ask the juror additional questions. I'm not going to spend a great deal of time rehabilitating jurors because you can sometimes convince people to say what you want them to say but that doesn't mean you've changed their mind.

We do not call jurors by their name in here. We call them by their juror number. You will be given a seating chart with everyone's juror number on it, and I anticipate that – in the past, some of our jurors have been vocal in their dislike of people who aren't in the country legally. So I don't know if that's an issue for you or your client, but you may want to address it.

MR. MEYRICK: He is in the country legally, Your Honor.

THE COURT: All right. Are there any other issues?

MS. KRUSEY: I don't believe so.

* * *

[14] (The prospective jurors entered the courtroom, and the following proceedings were conducted in the presence and hearing of the prospective jurors)

THE COURT: Good morning. I am going to explain to you what's happening here and the procedures that we're [15] going to use to pick the jury. The case we are about to try is a criminal case the Prosecution has brought in the name of the People of the State of

Colorado. In this case, the Prosecution is represented by Ms. Krusey.

Ms. Krusey, would you please stand and introduce yourself.

MS. KRUSEY: Good morning, ladies and gentlemen of the prospective jury panel. My name is Mandy Krusey. I'm a deputy district attorney with the Arapahoe County district attorney's office.

THE COURT: And the Defendant is represented by Mr. Meyrick.

Mr. Meyrick, would you please stand and introduce the people at your table.

MR. MEYRICK: Good morning. My name is Michael Meyrick, and with me is co-counsel, Kelly Cherry.

MS. CHERRY: Good morning.

MR. MEYRICK: And Miguel Pena, who is the Defendant in this case.

THE COURT: Thank you.

The charges against the Defendant are contained in what is called a Complaint and Information, and that simply describes the charges against the Defendant. It is not evidence of anything. In this case, the Complaint and Information reads as follows: Count 1, sexual assault on a [16] child, victim less than 15; Count 2, unlawful sexual contact, no consent; Count 3 and 4, harassment.

As I mentioned a minute ago, the charges against the Defendant are not evidence. By pleading not guilty, the Defendant has said he did not commit the crimes with which he is charged. He is presumed innocent; therefore, the Prosecution has the burden of

proving the guilt of the Defendant beyond a reasonable doubt.

Reasonable doubt means a doubt based upon reason and common sense which arises from a fair and rational consideration of all the evidence or lack of evidence in the case. It is a doubt which is not a vague, speculative, or imaginary doubt but such a doubt as would cause reasonable people to hesitate to act in matters of importance to themselves. The jury selected will decide if the Prosecution has proven beyond a reasonable doubt that the Defendant has committed the crimes with which he is charged.

There will be 12 jurors and 1 alternate selected to try this case. The people selected will consider all the evidence produced during the trial. It will be the sole responsibility of the jurors selected to try the case to determine the facts from all of the evidence received during the trial. This will require your close attention, absolute honesty, impartiality, and sound judgment.

It will not be necessary to keep the jurors [17] together at noon or at night. If you are selected to be a juror, you will be allowed to leave the courthouse during the noon recess and go home at night. Jurors and potential jurors must not discuss the case among themselves or with anyone else until instructed to do so by this Court.

You must not read, view, or listen to any reports about the case in the press, on the radio, television, or other media. That means you cannot Google, you cannot MapQuest, you cannot – I don't know all those things; but if it's on the computer, don't do it. You should also not form or express any opinion about the outcome of this matter until the Court instructs you to begin your deliberations.

I am going to now explain to you briefly the method we'll use in selecting a jury to try this case. As you can see, some of you have been called forward initially and others of you are sitting in the back, and I'm going to urge those of you sitting in the back to still pay close attention because you may be called forward before the jury-selection process has been completed. In a minute, I am going to give you your oath as jurors in this case. I'm going to ask you to stand and raise your right hand. I'll read the oath, and then I'll ask you to say, I will.

After the oath is administered, the Court and each attorney may ask questions of you concerning your ability to be fair and impartial jurors. You should answer fully all [18] questions asked by the attorneys or by me. Even though you may not be called forward initially, you should still listen closely to all the questions and answers that are given.

Okay. Would you stand now and raise your right hand?

(The prospective jurors were duly sworn by the Court.)

THE COURT: Thank you very much.

Now I'm going to read a list of grounds that will disqualify you to be a juror in this case. If any of these grounds apply to you, please raise your hand.

First of all, are you related to the Defendant or to the attorneys?

(No response.)

THE COURT: No hands are raised.

Do any of you have a relationship of guardian and ward, employer and employee, landlord and tenant,

debtor and creditor, or principal and agent, or are you a member of the household or a partner in business with or a surety on any bond or obligation–

(Prospective Juror Number 36 entered the courtroom.)

THE COURT: Did we lose someone?

THE CLERK: We did, Judge.

THE COURT: All right. Sir, at this time, I'm [19] going to ask you to stand and raise your right hand, please. (Prospective Juror Number 36 was duly sworn by the Court.)

THE COURT: Thank you very much.

As I was saying, are any of you related to the Defendant or the attorneys?

(No response.)

THE COURT: No hands are raised.

Do any of you have a relationship of guardian and ward, employer and employee, landlord and tenant, debtor and creditor, or principal and agent, or are you a member of the household or a partner in business with or a surety on any bond or obligation with or for the Defendant?

(No response.)

THE COURT: No hands are raised.

Are any of you now or have you been a party in a civil lawsuit involving the Defendant or complained against or been accused by the Defendant in a criminal prosecution? (No response.)

THE COURT: No hands are raised.

Have any of you been a grand juror or a witness at a former trial or proceeding arising out of the same factual situation involving the Defendant?

(No response.)

THE COURT: No hands are raised.

[20] Were any of you a witness in any matter related to the crime or its prosecution?

(No response.)

THE COURT: No hands are raised.

Do any of you have a personal or financial interest in the outcome of the case? By "interest," I mean a financial or other personal interest apart from any interest you might have as a citizen of a city, county, or state.

(No response.)

THE COURT: No hands are raised.

Do any of you have a feeling for or against the

Defendant or the Prosecution?

(No response.)

THE COURT: No hands are raised.

* * *

[51] Now, the next question is a very difficult one because I read you the charges in this case and everyone has very strong opinions about child sex assault. And I am sure that I speak for everyone when I say, no one here thinks it's a good thing, but I want you to understand that just because there are charges doesn't mean that the Defendant is guilty. I told you earlier, he's presumed innocent, and that presumption stays with him until the conclusion of all the evidence,

when the jury goes back into the jury room and then deliberates.

So if I have a jury seated in the jury box and I say to the district attorney, Call your first witness, and she says, We rest, I think we all agree that the district attorney has not met her burden and that your verdict would be not guilty. And I have this long preamble because the next question is going to raise a lot of issues.

So what I'm going to do is read the question, and then instead of asking you to raise your hand, I'm going to say to you, Understanding now that the Defendant is presumed [52] not guilty, understanding the district attorney has to convince you of his guilt beyond a reasonable doubt, if you still think you want to speak to us, let's talk about it privately.

And the question is this: Is there anything about the nature of this case which would, in and of itself, influence any of you at arriving at a verdict? Now, this is one of those questions, I think you understand, we need to hear from you privately, so we won't – I won't ask you to raise your hands.

* * *

[53] THE COURT: Okay. And, again, one of those questions we'd want to speak to you about privately. If you're selected to be a juror in this case, is there any reason why you would not be able and willing to render a verdict solely on the evidence presented at trial and the law that I give to you and disregard any other ideas, notions, or beliefs about the law you may have encountered? We'll speak to you privately if you can't say that you could do that.

Now, is there anything else that somebody wants to talk to me about and we haven't discussed it at this time?

(No response.)

* * *

[124] MR. MEYRICK: Good afternoon, ladies and gentlemen, and thank you for your attention. The good news about all this is that, because I go second, a lot of these questions have already been asked, so I don't have to go through all of this again, so this shouldn't take very much time.

But I do have a few questions because, as some of you answered some of the questions earlier, that gave rise to more questions in my mind. So I just want to cover that because it's really important that we establish that the people that we select to do this today can be fair, and that's all we're asking for.

And to pick up close to where Ms. Krusey left off, Juror Number 3, there was a question about a paper that you had written, I guess, in college on something that was related to this subject; is that right?

PROSPECTIVE JUROR NUMBER 3: Yes.

MR. MEYRICK: And I think that when she asked you if you thought that that would have an effect on you in this case, you just kind of hesitated a little bit and said, I don't think so, but I – that's what concerns me a little bit. So can you tell me a little more about – not so much the subject matter but whether or not you think that that would have an effect on your decision in this case?

[125] PROSPECTIVE JUROR NUMBER 3: It shouldn't have any effect–

MR. MEYRICK: Okay.

PROSPECTIVE JUROR NUMBER 3: – because any decision I would come to would have to be after I have heard evidence and things.

MR. MEYRICK: Right. So, I mean, as you do research on papers and so on and so forth, the facts are all different in different cases, right?

PROSPECTIVE JUROR NUMBER 3: Yes.

MR. MEYRICK: And so the facts in this case are not going to be the same as the facts in anything, perhaps, that you have researched, right?

PROSPECTIVE JUROR NUMBER 3: Right.

MR. MEYRICK: And so you would be able to set that aside and just go by what you hear for the facts in this case?

PROSPECTIVE JUROR NUMBER 3: Yes.

MR. MEYRICK: Okay. Good. Thank you. Thank you for that.

And, Juror Number 12, you're going to – you're going to hear the judge tell you – whether it's this judge or another judge, some judge is going to tell you that the Defendant has a right to testify in the case. He also has the right not to testify; and if he chooses not to testify, [126] then you can't hold that against him. Does that present a problem for you?

PROSPECTIVE JUROR NUMBER 12: No, not at all.

MR. MEYRICK: Why do you think that is?

PROSPECTIVE JUROR NUMBER 12: Well, I mean – so, obviously, that is the law; and he, obviously, has that right; and he can choose – actually,

that means he hasn't done anything incorrect or wrong, and so I guess I wouldn't – I wouldn't judge him differently–

MR. MEYRICK: Okay.

PROSPECTIVE JUROR NUMBER 12: – whether he chooses to or not.

MR. MEYRICK: Okay. Does anybody disagree with that? Because some people do have a problem with that. Some people would think that, well, you know, I think that if I were in his shoes and I were charged with something, I'd want to get up there and say I didn't do it. Does that – does anybody feel that way? Does – I mean, it's not an uncommon feeling.

(No response.)

MR. MEYRICK: And, Juror Number 44, how do you feel about that?

PROSPECTIVE JUROR NUMBER 44: Well, it doesn't matter what – in my opinion, it doesn't matter what I would do in his – or the Defendant's position. I am to sit and [127] listen to both sides. And so the bottom line is, if it's within the law and he chooses not to do it, then I still have to have an open mind.

MR. MEYRICK: Right. And, I mean, if – if he chose to testify, would you listen to what he had to say and, perhaps, wonder, well, I wonder if he's just saying that to just kind of save his own hide, or what would you think?

PROSPECTIVE JUROR NUMBER 44: Me?

MR. MEYRICK: Yes.

PROSPECTIVE JUROR NUMBER 44: I would treat him, in this case, just like another witness.

MR. MEYRICK: Right. But, I mean, he could be in the position that, no matter what he did, people would be questioning what he did because, if he took the stand and testified and people were wondering, well, I wonder if he's just saying that to save him – save his own hide, or if he chose not to testify, then he's sort of in a bad position that, no matter what he does, people are going to question why.

PROSPECTIVE JUROR NUMBER 44: Well, obviously, people are questioning or he wouldn't be in the position he's in today.

MR. MEYRICK: Okay.

PROSPECTIVE JUROR NUMBER 44: It's not our responsibility to wonder. It's our responsibility to listen [128] and then render a judgment based upon consultation with the peers that you're with and everybody's opinion, and you mold together, as I understand the system, and come out with one verdict.

MR. MEYRICK: Okay. And does anybody disagree with that in either the back of the room or in this panel up in front? Does anybody have a problem with that at all?

(No response.)

MR. MEYRICK: Okay. Thank you.

Number 14. I noticed on your questionnaire about your job, and so I wanted to go into that a little bit. Do you feel that your position or your job would hinder you in any way in being fair about this process?

PROSPECTIVE JUROR NUMBER 14: No.

MR. MEYRICK: Okay. Because in your job, you see people that have been witnesses in these types of cases; is that right?

PROSPECTIVE JUROR NUMBER 14: Correct.

MR. MEYRICK: And do you also see people who have been accused of these things?

PROSPECTIVE JUROR NUMBER 14: I do.

MR. MEYRICK: Okay. And do you think that you can listen to the facts of the case and come to some conclusion that's fair based on the evidence in this case?

PROSPECTIVE JUROR NUMBER 14: Yes, I do.

[129] MR. MEYRICK: Okay. Do you have any question about that whatsoever?

PROSPECTIVE JUROR NUMBER 14: No.

MR. MEYRICK: Okay. Thank you.

And, Juror Number 15, I think when you were describing earlier for us that you saw – you saw an incident take place that eventually became the subject of some court proceeding; is that right?

PROSPECTIVE JUROR NUMBER 15: Correct.

MR. MEYRICK: And, apparently, you saw that differently from how other people saw it or how other people may have related that to the court, right?

PROSPECTIVE JUROR NUMBER 15: Right.

MR. MEYRICK: So you understand that people can perceive things differently, right? They can watch the same thing and perceive them differently?

PROSPECTIVE JUROR NUMBER 15: Right.

MR. MEYRICK: Do you think that people, based on your experience, can exaggerate?

PROSPECTIVE JUROR NUMBER 15: Yes. Yeah, they can.

MR. MEYRICK: And why do – and why would they exaggerate, do you think?

PROSPECTIVE JUROR NUMBER 15: I don't know. To – I don't know.

[130] MR. MEYRICK: There may be any number of reasons, right?

PROSPECTIVE JUROR NUMBER 15: Right. Yeah, there could be any number of reasons.

MR. MEYRICK: Okay. Is that something that you could watch for in testimony in order to determine what kind of weight you would give it?

PROSPECTIVE JUROR NUMBER 15: Yeah.

MR. MEYRICK: Would you have a problem with that?

PROSPECTIVE JUROR NUMBER 15: No.

MR. MEYRICK: Okay. Thank you.

And, number 16, I think that you made the statement earlier that, well, if somebody is under oath, then they would be telling the truth; is that right?

PROSPECTIVE JUROR NUMBER 16: Yes, sir. I would.

MR. MEYRICK: You would. Does that mean that everybody –

PROSPECTIVE JUROR NUMBER 16: No.

MR. MEYRICK: – who is under oath always tells the truth?

PROSPECTIVE JUROR NUMBER 16: No, absolutely not.

MR. MEYRICK: And there may be, in fact, varying degrees of that, right, of what that truth is?

PROSPECTIVE JUROR NUMBER 16: Oh, yeah. I mean, definitely, I would say. Are you asking me similar to what [131] you were asking her?

MR. MEYRICK: Yes. Right. Right.

PROSPECTIVE JUROR NUMBER 16: Yeah. There's gonna be different perceptions, yeah, I think, of what happened, and I–

THE REPORTER: I'm sorry. I couldn't hear that.

PROSPECTIVE JUROR NUMBER 16: I agree with her. I said, I agree with her. I think, yeah, you've got to – you've got to watch, you know. You've got to pay attention to what people are saying, see how they're saying it, you know, what kind of tone they're using, actions. You gotta kind of feel out what they're saying.

You've got to be able to feel them out, do I feel that they're telling the truth. I would have to say, if I feel – do I feel like they're telling the truth. You know, they're under oath, but people do lie. It's just a fact of life, period. So, yeah, I think people, you know, can play with the truth, or they can manipulate the way they want it to come out.

MR. MEYRICK: Okay. So – and to follow up on that for just a minute, I mean, there may be – there may be a perception that somebody's trying to relate that's different from somebody else's perception of the same thing?

PROSPECTIVE JUROR NUMBER 16: Yeah.

MR. MEYRICK: So in their mind, they're telling [132] the truth, right?

PROSPECTIVE JUROR NUMBER 16: Yeah. In the Defendant's mind, he's telling the truth, and the witnesses, you know, they're telling the truth. So

you've got to come to that as – as 44 said, you know, as a group, we've got to come to a decision, you know, based on – that's why we have 12 people -

MR. MEYRICK: Right.

PROSPECTIVE JUROR NUMBER 16: – or 13 people, so we can get that – get it out on the table and chop it up and dice it up.

MR. MEYRICK: And there may be things that you have to – you have to look at to determine what weight – not so much whether somebody is actually telling the truth or not telling the truth – but what weight you would give to some particular account, right?

PROSPECTIVE JUROR NUMBER 16: I do agree.

MR. MEYRICK: And, I mean, if, for example, the issue were identification, then the things that you would look for are what?

PROSPECTIVE JUROR NUMBER 16: Identification of what?

MR. MEYRICK: A person.

PROSPECTIVE JUROR NUMBER 16: A person?

MR. MEYRICK: Yes.

[133] PROSPECTIVE JUROR NUMBER 16: So if someone was drinking and they thought they saw some guy do it and it was – you know, are they inebriated? There's a lot of things – there's a lot of issues.

MR. MEYRICK: Okay.

PROSPECTIVE JUROR NUMBER 16: That's the way I see it.

MR. MEYRICK: How the identification is made?

PROSPECTIVE JUROR NUMBER 16: Yeah, how the process – I mean, are you in a dark room? Do you have night-vision goggles on? I mean, that's – you know, are you inebriated? There's a lot of – there's definitely a lot going on there, for sure.

MR. MEYRICK: Okay. Thank you.

And, Juror Number 17, we've already heard from the judge about the presumption of innocence, that the Defendant is presumed innocent. Now, I know that you related that you had some experience through someone that you knew that had some problems with the law, and you thought that he got what he deserved.

PROSPECTIVE JUROR NUMBER 17: Absolutely.

MR. MEYRICK: But let me ask you this, though. Do you have a problem with presuming somebody innocent to begin with?

PROSPECTIVE JUROR NUMBER 17: Do I have a problem [134] presuming someone to be innocent to begin with?

MR. MEYRICK: Yes.

PROSPECTIVE JUROR NUMBER 17: No.

MR. MEYRICK: And making the State prove that case beyond a reasonable doubt?

PROSPECTIVE JUROR NUMBER 17: They would have to prove it beyond a reasonable doubt.

MR. MEYRICK: Okay. Is there anybody who disagrees with that and thinks that, well, if you got charged with something, you must have done something wrong? Is there anybody who feels that way? Because that is a common feeling among a lot of people; that, you know, the police don't just indiscriminately go out and arrest people. Does that

present a problem for you, that – that, you know, down deep, he must have done something because, otherwise, he wouldn't be arrested, he wouldn't be here? Anybody?

(No response.)

MR. MEYRICK: Okay. Number 26.

PROSPECTIVE JUROR NUMBER 26: Sure.

MR. MEYRICK: When – when we talk about beyond a reasonable doubt, can you, generally, tell me what that means to you from a layman's perspective? What's beyond a reasonable doubt to you?

PROSPECTIVE JUROR NUMBER 26: Beyond a reasonable doubt is that he actually committed the crime. You know, [135] I – I wasn't there, so I don't know. I'd have to hear the witnesses and their statements, and then – well -

MR. MEYRICK: Well, if it came down to maybe he did and maybe he didn't, what – what's your verdict in that case? If it came down to, well, you know, there's some indication here that looks bad for him, other things look good for him, what's your verdict if it's maybe?

PROSPECTIVE JUROR NUMBER 26: What's my verdict?

MR. MEYRICK: Yes.

PROSPECTIVE JUROR NUMBER 26: You know, it's hard to say. I'd have to hear a lot of – a lot of testimony.

MR. MEYRICK: I know, and it's difficult, and I don't like to put you in this spot of trying to – you know, one thing that we can't do too much is get into the facts of the case in the selection process, and that's a little bit

of a hindrance because we're asking you questions that are sort of hypothetical, but – but what I'm wondering from you is what you think that standard means, beyond a reasonable doubt. What does that – what does that mean to you?

PROSPECTIVE JUROR NUMBER 26: Man, I – it's hard to say.

MR. MEYRICK: It is hard.

PROSPECTIVE JUROR NUMBER 26: Well –

MR. MEYRICK: Is that – anybody else who thinks that they may have even a definition of what that is, beyond [136] a reasonable doubt?

Yes. And it's Juror Number 30?

PROSPECTIVE JUROR NUMBER 30: Thirty.

MR. MEYRICK: Yes.

PROSPECTIVE JUROR NUMBER 30: Basically, everything would have to – everything would have to point to him being guilty. If they couldn't prove that he was guilty with all the corroborations of the witnesses or whatever evidence was available and his testimony, then you'd have to say not guilty.

MR. MEYRICK: Okay. And that's – thank you. And that's – that's what I was getting to. This is – you know, there are differences between civil cases and criminal cases. This is not a civil case. This is a criminal case, you see. In a civil case, it's 51 percent, you know, one side or the other, but that's not the case in a criminal case, and I just wanted to make sure that everybody understood that, okay?

Now – and I just have one last question to the general panel, and this is the most important question of all because, a lot of times, we – you know, we ask

these questions but we miss that one question that you've got in the back of your mind. And so I want to ask you, as a panel generally, is there anybody here who thinks for some reason, whether or not it's been discussed already, that this is simply not a good case for them to be a fair juror?

[137] (No response.)

MR. MEYRICK: Thank you.

That's all I have, Your Honor.

THE COURT: Was there a hand?

MS. KRUSEY: Yes.

MR. MEYRICK: Was there a hand? I'm sorry.

PROSPECTIVE JUROR NUMBER 39: Just the scenario.

MR. MEYRICK: That you've discussed?

PROSPECTIVE JUROR NUMBER 39: Yeah.

MR. MEYRICK: Okay.

PROSPECTIVE JUROR NUMBER 39: It's just weird, you know –

MR. MEYRICK: Okay.

PROSPECTIVE JUROR NUMBER 39: – until it happens to you.

MR. MEYRICK: That we talked about?

PROSPECTIVE JUROR NUMBER 39: Yeah.

MR. MEYRICK: Okay. Thank you.

THE COURT: Approach, please, Counsel.

(The following proceedings were conducted at the bench out of the hearing of the prospective jurors)

THE COURT: Do you pass the panel for cause?

MR. MEYRICK: I do, Your Honor.

THE COURT: Thank you. Step back.

* * *

[140] MS. KRUSEY: The People will waive, Your Honor.

THE COURT: All right. To the folks in the jury-panel box, you are the ones who are going to be the panel that hears this case. This is your last opportunity. If there is something you've been thinking about that we should know, something you haven't shared because you didn't really think you would be back there or any reason why you can't or don't want to serve on this panel, please tell us now.

* * *

[144] THE COURT: Now, for the folks in the back over here, again, you are likely to be the jurors in this case. This is your last opportunity to tell us whatever you want to tell us about your service as jurors in this case.

(No response.)

[145] THE COURT: To the rest of the folks in the room, thank you very much for your service. You have provided your jury service for this year, and you are free to go down and check out with the jury commissioner's office, and that's the room where you came in first thing this morning. So please stand.

(The prospective jurors exited the courtroom.)

THE COURT: Thank you. I'm going to swear you in now as jurors to hear this case, and then Matt is going to take you into the jury room and talk to you for a few

minutes. When you come out, you're going to come into Courtroom 206, and that is where you will be jurors in the case. So would you please raise your right hand.

(The jury panel was duly sworn by the Court.)

THE COURT: Thank you very much.

(The jury exited the courtroom, and the following proceedings were conducted out of the presence and hearing of the jury:)

THE COURT: Have a seat. The reason we're going to use the 207 jury room is, it has access to the front hall so the staff doesn't have to go out and let the jury members in. It's just a lot easier for staff, and it won't affect the trial at all because, instead of coming through that door, they'll just go around and into the next door. Your client isn't in custody, so that won't be a big issue.

[146] Batson challenges. Do you have a Batson challenge, Counsel?

MS. KRUSEY: No, Your Honor.

MR. MEYRICK: I do not.

THE COURT: All right. Is there anything else that we need to address before you go next door?

MS. KRUSEY: Nothing from the People.

MR. MEYRICK: Nothing from the Defendant, Your Honor.

THE COURT: All right. Thank you all for coming in, and good luck in the trial to everybody.

COURT REPORTER'S TRANSCRIPT
February 23, 2010

The Trial in this matter commenced at 2:57 p.m. on Tuesday, February 23, 2010, before the HONORABLE JOHN L. WHEELER, Judge of the District Court, and a jury of twelve.

This is a partial transcript of the proceedings in the above-named matter conducted on this date.

APPEARANCES

FOR THE PEOPLE: AMANDA K. KRUSEY, ESQ.
Registration No. 41094

FOR THE DEFENDANT: MICHAEL W. MEYRICK, ESQ.
Registration No. 29748

KELLY C. CHERRY, ESQ.
Registration No. 40105

* * *

[4] THE COURT: Thank you. Please be seated.

Good afternoon, ladies and gentlemen. My name is John Wheeler, and I am the district court judge in Division 206.

* * *

[7] During any break that we take – and I will explain this to you in detail now and then refer to it much more briefly later, but I like to get this out of the way right up front. During any break that we take – whether it is simply to go back for a few minutes, go back for a 20-minute break or a lunch break or an

overnight break – during that time, you may not discuss this case among yourselves.

In criminal cases in Colorado, the jury is not allowed to discuss the case until charged with deliberation. That is at the very end of the case. Not only may you not discuss it among yourselves, of course, you may not discuss [8] it with any friends, family, relatives, anyone that may ask you about the case who is a complete stranger, husbands, wives, children, grandparents. You simply can't talk about this case with anyone. It's not their business. It is your business and your business only.

Finally, all of that comes to the fact that you may not make your own minds up about any material fact in this case until the case is completely finished, and I will discuss what we are going to be doing here for the next few days so you'll understand when that will come.

I've got some cough drops here.

JUROR NUMBER 23: It's asthma, breathing problems.

THE COURT: Okay.

JUROR NUMBER 23: There's nothing I can do about it.

THE COURT: Are you okay?

JUROR NUMBER 23: It will go on constantly, but go ahead.

THE COURT: Okay. As I say, you may not make your own mind up about any material fact in this case. That is because the Defendant is presumed to be innocent, as you have heard. That presumption of innocence lasts through the trial. And then at the end

of the trial, during your deliberations, if, and only if, the district attorney, the Prosecution, proves beyond a reasonable doubt each and every [9] element of each charge may you consider the Defendant at that time guilty. Until that time, if it should come, the Defendant is presumed to be innocent.

Consequently, until the entire case is finished and you begin your deliberations, you may not make your own mind up about any material fact in the case because you must listen to the entire case before deliberations begin. Please do not try to gather any information on your own in this case. The case must be decided upon the evidence presented at the trial. There is an instruction that I give – I will give it at the end of this trial and I will tell you now – that the case is decided on the evidence from this witness stand or the lack of evidence in the case.

Because the case is determined on the evidence or the lack of evidence that you hear, you may not gather evidence on your own. You may not do any investigation. All the evidence that you are to hear will be from this witness stand or from documents that are presented through the witness stand or photos or anything else that you see that are admitted into evidence. If you don't see it here, it is not evidence in the case, and then there would be a lack of evidence, which is a legitimate basis upon which to rest a verdict, the evidence or the lack of evidence.

That's the reason why you can't be the investigators. This is probably the most important [10] admonition that I give because, in this day and age, if you have a question about something – let's say this were a civil case involving medical negligence and there was a medical term that was presented from the stand and it just wasn't explained very well and you go, Well, I

know how to find that out. I'll just Google it up. You can't do that. That's investigation.

You may hear a name or a term. You may hear a location and say, I'm going to go on MapQuest and get an aerial view, and I'll see exactly what that intersection where that auto accident is alleged to have happened looks like. You can't do that. You can't Twitter. You can't e-mail. You can't research to anyone or about anything in this case.

Ten years ago, this wasn't a problem. It's a great problem now. I will never know whether this happens. You have taken an oath before Judge Antrim and, essentially, before me to be a juror in this case and not to do that. I will as well give this admonition each time that you go on break. I will refer to it very simply as admonition number one. I won't go into this excruciating detail again because I know that you understand this.

So let me explain what is going to be happening here in the next couple of days. After the jury-selection procedures, the first step in the trial is opening [11] statements. We will be doing that here today. I am going to probably – well, we're going to be doing that immediately after this advisement.

Either attorney may make an opening statement if he or she wishes to do so. However, the Defendant's attorney may reserve opening statement until a later time in the trial or elect not to do an opening statement at all. That is the choice of the Defense and the defense attorney. That's because, as you have been told, the Defendant is presumed to be innocent.

As a result of the presumption of innocence, the Defense has to produce no evidence. The Defendant has to produce no testimony if they wish. They may

simply sit silent if they wish, if the Defendant wishes, because the Defendant is presumed to be innocent. If the Prosecution does not convince you beyond a reasonable doubt as to each element of each charge, then the Defense has to do nothing. Now, they may elect to do something, but they are not required to do anything, including an opening statement if they wish.

After opening statements, the Prosecution will offer evidence. The evidence consists of the sworn testimony of the witnesses, the exhibits admitted into evidence by the Court, and any other facts that you are instructed by the Court to consider. After the Prosecution's evidence, the [12] Defendant may present evidence but is not required to do so.

I will remind you again that the Defendant is presumed innocent. The Prosecution must prove the guilt of the Defendant beyond a reasonable doubt. The Defendant does not have to prove his innocence because it is presumed. The Defendant doesn't have to call any witnesses or introduce any evidence.

You may have to decide what testimony to believe. Consider all of the testimony given and the circumstances under which each witness has testified. Consider each witness' knowledge, motive, state of mind, demeanor, and manner while on the witness stand. Consider the witness' means of knowledge, ability to observe, and strength of memory.

Consider also any relationship each witness may have to either side of the case, the manner in which each witness may be affected by the verdict, and the extent to which, if at all, each witness is either supported by or contradicted by other evidence in the case. Consider all facts and circumstances shown by

the evidence which affect the credibility of each witness' testimony.

You may believe all of the testimony of a witness, part of the testimony of a witness, or none of that witness' testimony. That is for each of you to decide and, ultimately, for 12 of you to decide. That's the third part.

[13] Choosing the jury, opening statements, and evidence. The third part of the case.

The fourth part of the case. At the conclusion of the evidence, I will give you the rules of law which you are to use in reaching your verdict. I will read them to you from the written jury instructions. You will each have a copy, your own copy of those instructions, as I read them to you. Those are the rules of law. You will be allowed to take those copies – make any notes on them that you wish – back into the jury room with you for your deliberations.

After you have heard all the evidence and the instructions, the fifth part of the case. The Prosecution and the Defense may, then, make their closing arguments. The opening statements that will be made here today are not evidence. They are merely the attorneys' view of what they anticipate you will hear in the evidence, what they are going to be putting on, or what you will hear from the other side in the case of the Defense. It's not evidence. It is merely their view of the evidence. They're giving you a little preview of it.

You will, then, have the evidence. After that, the written instructions of law and then the closing arguments. Closing arguments are also not evidence. It's merely each attorney's view of what you have

heard. They will tell you what they anticipate you are going to here.

[14] Then you will hear it, and then they will summarize it for you in the way which they wish you to consider it.

It is, of course, up to the jury to decide how to organize and determine the facts in the case which are true. Neither opening nor closing are evidence. It is only the middle section, the presentation of evidence, which are the facts.

At that point, the sixth and final phase of the trial will begin, and that is jury deliberation. After all other matters – opening, evidence, closing – or my written jury instructions and closing – then I will charge 12 of you to deliberate this case.

The alternate will be excused. The alternate was chosen some ten days ago by seat position. Whoever ended up in that seat, that is the alternate. We didn't know who you would be, and now you do not know, of course, who the alternate is. As far as each of you are concerned, you are a member of the 12 people who will decide this case as the jury.

Then, and only then, when I charge you with deliberation, may you first decide the matters in your own head, make final determinations of material issues of fact in your own mind, and for the first time talk with your fellow jurors about the facts in the case. Before that, you may not do either.

[15] At times during the trial, the attorneys may make objections. This simply means that the attorney is requesting that I make a decision on a particular rule of law. It is the duty of an attorney to make objections as to evidence which he or she feels is not

appropriate to be introduced in the case. Do not hold an attorney accountable for an objection. Don't hold it against him or her. It is their job to object to evidence.

I will try to rule on each of those objections very quickly so that it does not interrupt the flow of the case. If I need to talk with the attorneys privately, I will bring them up here. We have a little white noise machine there we turn on, and we talk very softly into a microphone out of your hearing. It's not that these are secret matters. It is simply that if we discuss them in your presence, we would probably be discussing exactly what you are not supposed to be hearing as far as the evidence is concerned.

If I overrule an objection, that means that the objection will not occur and you will hear the evidence from the witness. If I sustain an objection, that means that you will not hear the evidence because it is somehow legally inappropriate to ask that question. If a question – if an objection is sustained and you do not hear the answer, do not speculate or guess as to what that answer from that witness might have been. It may have been very interesting to you, [16] but I would have ruled at that point that it is legally inappropriate for you to hear that answer. Please don't try to guess what that answer might have been.

Sometimes, answers to questions are objectionable. So the question is fine, but the answer that the witness gives itself is inappropriate under the law. If an objection to an answer is given, I will, then, have the – I will either overrule the objection, in which case the case merely goes forward. You have heard the evidence and consider it. If I sustain an objection to an answer, I have the unenviable job, then, of turning to you and telling you to disregard what you've just heard.

Lawyers call that unringing the bell. It's very difficult to do, very difficult. But I will instruct you that what you have just heard is inappropriate, not admissible in the case, and you must not consider it in any way in your deliberations on a verdict. Difficult but that's sometimes what happens. It may not happen in this case; but if it does, that's what I will be telling you.

It's my job to decide what rules of law apply to the case. These are the written instructions of law that I have told you about briefly. You must follow all of the rules of law in writing that I give to you. Even if you disagree with those laws or don't understand the reason behind the law, you must follow those laws, and that is what [17] you have sworn to do as a juror in this case.

You must, then, apply those laws to the facts which you determine, and only the jury determines the facts in the case. That's why you're called the finders of fact. I determine the law. You determine the facts which apply to those laws. In that way, you will determine whether the Prosecution has proven the guilt of the Defendant beyond a reasonable doubt. Until that time, remember, the Defendant is presumed to be innocent.

During the trial, I may need to talk with the attorneys out of your hearing. Sometimes these conferences – if we cannot resolve the issue quickly either at the podium or up here, we'll ask you to leave the room for a brief time. We will try to minimize that and try to do our business here out of your hearing so you don't have to march in and out a lot, but sometimes it will occur. Hopefully, not very often.

You have received notebooks. You may use the notebooks to take notes during the trial; however,

you're not required to do so. It's merely for your convenience. If you do take notes, please do not allow the note-taking to detract from your observation of these witnesses. As I indicated, much of your decision-making will be made by what you observe, the demeanor of the witnesses, what they say, and how they say it, not just what they say.

[18] So if you do take notes, your job is not to be a stenographer, to take everything down word for word. You can do whatever you wish but please do try to pay close attention in watching the witnesses. As you can see, Cathy is taking everything that we say down here. This is the most strenuous job in the courtroom, as you can probably imagine.

Everything we say, word for word, and identifying it to every person who says it takes a great deal of concentration.

This record that she creates, however, is not for your use. You may not, at the end of this case, ask for a transcript of Mr. Smith's testimony or Jane Doe's testimony or whatever. That is not available for you. You must rely on your memory, on your notes, or the notes of others, although you are not bound by anyone else's notes. You're not even bound by your own notes. But you may, certainly, use any of those as a collective memory when deliberations begin.

During the course of the trial, I may ask a question of a witness. I try not to do that. Ninety-nine times out of a hundred, if I do ask a witness a question, it will be the following: A witness will have been asked a question which is, essentially, a yes-or-no question and they'll go "uh-huh." And if the attorney does not immediately catch that and ask them, I will turn to them and say, Was that a "yes"?

[19] It's not fair to the court reporter and it's, certainly, not fair to you to try and distinguish an "uh-uh" from an "huh-uh" or a shake or a nod of the head. The court reporter will report that, but it's not fair, and I will – if it is not corrected by the attorneys, I will turn to the witness – and usually it only takes once. It's very common. But once corrected, they will usually not do it again. If they do, I'll just ask them again.

That will be the only time that I ever address a witness directly. If I do so, please remember, that is not a signal that that is a crucial or important question or more important than any other question. It's merely to straighten out the record and make sure that you understand what the answer is and that we have a clear recorded record for other purposes.

During the questioning in my courtroom, we have four types – traditionally, four types of questions. We have direct examination, which is, when an attorney calls a witness to the stand, they ask direct-examination questions. After that examination is completed, we have, by the other attorney, cross-examination, sometimes a very different type of questioning, and I'll explain that in a minute.

After cross-examination, based on those questions in cross, we have redirect by the first attorney. And, of course, based on redirect questions, we have recross.

[20] Direct, cross, redirect, recross. I explain this for two reasons. One, an objection may be made to a question that's asked on direct examination which I would sustain the objection because it would be an inappropriate question on direct. The same exact question in exactly the same words in the same way can be asked on cross and be completely appropriate.

So that if I sustain a question on direct and overrule the objection – or sustain an objection on direct to a question and overrule the objection or permit the same question on cross, please don't think I'm favoring one attorney over the other. It is simply the rules of procedure in the courtroom about the difference between direct and cross-examination.

I also explain those four parts – direct, cross, redirect, recross – because when that's finished, I will turn to you and say, That completes the examination of Mr. Smith. Rules governing jury trials in Colorado do not allow jurors to ask questions directly of a witness.

However, if you have a question in your mind at the completion of that direct-cross-redirect-recross cycle still in your mind, a question that you don't feel this witness has answered and it's in your mind, write that question down. You'll find the forms in the back of your jury notebooks, juror questions.

[21] And those will be collected by the bailiff; or if not, our court reporter will get to stretch her legs and get them; or I'll get them. You'll pass them down to the front, fold them in half, put them right there on the bar in front of you. I will review them. I will, then, review them with the attorneys just as if they were questions from attorneys. If they are appropriate questions, I will ask the witness the question. The witness will answer directly to you, and the attorneys may follow up on it.

Just as if it were asked by an attorney, if it is a question that is not appropriate, I will tell you as a group, just as I would tell an attorney, why I can't – the legal reason, evidentiary reason, for not asking it. Maybe it's hearsay. Maybe it's – whatever. I will tell

you that. If I do not ask a question that you have presented, please do not guess or speculate as to what the answer might have been.

Also, with those questions, you have pages to take notes with sections for each witness. Just write the witness name, if you wish to do it that way, in your notes. If you have a question, say, in cross-examination, gee, what about this, well, by the end of the entire examination, all four parts of it, it may not be important to you anymore or it may have been answered. At that time, at the end, write it on the juror-question form. If you submit a question during direct, in all likelihood, it's going to be answered. So [22] please save that until the end.

If you're still writing when I turn to you and say, That completes the examination of witness X, we'll wait for you – don't worry about it – and pass those forward then. After the first witness, I will remind you not only that this is the completion of witness X's testimony, but I will say, This is the time if you have questions. I will do that once. After that, I will simply turn to you after each witness and say, That completes the testimony of witness X. I will rely on you, then, to understand that that's the time if you have a written question.

Once the witness leaves the stand, that's the end of any question you may ask of that witness. We cannot re-call a witness if you later think, gee, I wish I would have asked witness X three hours ago about this. That's too late. It must be done while the witness is still on the stand.

I am going to have the first of my little conferences with counsel. If you'd approach. Off the record.

(The Court and Counsel had a discussion off the record at the bench out of the hearing of the jury.)

THE COURT: Those are all the comments that I have. We will now have the opening statements from the parties.

* * *

[29] THE COURT: Thank you.

Ladies and gentlemen, this has already been a long day for you. I know that. And what we are going to do now is to adjourn. We're going to be back at 8:30 tomorrow morning with our first witness and proceed through the day with as many witnesses as we can do tomorrow and proceed as quickly as we can. Until that time, Amanda will take you back to your jury room. You may, then, leave for the day.

I will give you, as you heard, admonition number one. My brief version of it is, please do not make your own mind up about any material fact in the case. Do not talk to any third parties at all about any aspect of this case. If someone asks, you may tell them that you are a juror in a criminal case – not the type of case, not anything more than that – simply a juror in a criminal case and you'll be involved here for three more days possibly, and that's it.

Please do not do any investigation. You have heard the outline of what the attorneys feel the evidence may show. You have heard no evidence so far. So please don't do any investigation about any names, places which you have heard about. And we'll see you tomorrow at 8:30. Thank you very much.

REPORTER'S TRANSCRIPT

APPEARANCES

FOR THE PEOPLE: AMANDA K. KRUSEY, ESQ.

FOR THE DEFENDANT: MICHAEL W. MEYRICK, ESQ.

KELLY C. CHERRY, ESQ.

THE DEFENDANT APPEARS IN PERSON ON BOND.

This matter comes on for trial before the HONORABLE JOHN L. WHEELER, Judge of the District Court, on Thursday, February 25, 2010.

This is a complete transcript of the proceedings had in the case at that time.

* * *

[76] THE COURT: Thank you.

(The last instruction was read, but not reported.)

THE COURT: That is an additional restriction on you than simply the admonition one that I've given to you earlier during breaks. The reason that it is so important during deliberations is that you have confidential deliberations that no one can talk to you. And that you not have the ability to talk [77] to anyone is because at that time, for the first time, not only will you be able to consider the matter yourself, but you'll be able to talk with your 11 other jurors, each of you, 12 in total, about the case.

Consequently, during your deliberations, during the time that you're in the jury room, we will be taking your cell phones, laptops, any communication devices.

Amanda will keep those in my chambers until such time as your deliberations are complete, or that you adjourn for the day and return, if that should occur. However, during that time, you will not be able to communicate with anyone.

As you know, your lunch will be brought in to you. That's where you'll eat. If you require a break, Amanda will escort you to a private place where you could have a break. But if you leave the jury room, there will be no discussion, no deliberation during that time. Deliberations may only occur first while you're in the jury room and, second, while all jurors are present. If someone has adjourned for a minute to the restroom or something, no deliberations, no discussions may occur.

You'll have the following – or will soon have [78] the following information to assist you in reaching your verdict. You have your own copy of the jury instructions. And attached to those is a copy of the verdict forms. You can do anything you wish with those, make notes on them. They are easily distinguished from these original copies which are in these folders – the original instructions, which are not stapled, and the original verdict forms, not stapled. You could tell if it is a copy because it's either stamped "Copy," or all stapled together. The foreperson will have these originals. I ask you not to make any marks whatsoever on the original instructions. And the only marks that should be on the original verdict forms are the signatures of the – signature of the foreperson on each verdict form. Those are the only marks that should be on the verdict form.

In addition, you'll have all of the evidence in the case. There's not a lot of it as far as physical evidence, but all the evidence that you've heard, of course, in

testimony, you have as well in your notes or your memories. We will put all the physical evidence in a folder as well marked "Exhibits." Please do not mark on the original exhibits, although you may do anything else as far [79] as viewing them.

I'm going to swear in Amanda as the bailiff. I'll swear my clerk, if necessary. My clerk will also act as bailiff.

(The bailiff was sworn by the Court.)

JURY INSTRUCTIONS

Instruction Nos. 1 through 21 given by the Court this 25th day of February, 2010.

/s/ John L. Wheeler
JOHN L. WHEELER
District Court Judge

INSTRUCTION NO. 1

Members of the jury, the evidence in this case has been completed. In a moment I will read you the law which you must apply in order to reach your verdict. But first, I want to mention a few things that you need to keep in mind when you are discussing this case in the jury room.

It is my job to decide what rules of law apply to the case. While the lawyers may have commented during the trial on some of these rules, you are to be guided by what I say about them. You must follow all of the rules as I explain them to you. Even if you disagree or don't understand the reasons for some of the rules, you must follow them. No single rule describes all the law which must be applied. Therefore, the rules must be considered together as a whole.

During the course of the trial you received all of the evidence that you may properly consider to decide the case. Your decision must be made by applying the rules of law which I give you to the evidence presented at trial. Neither sympathy nor prejudice should influence your decision.

If you decide that the prosecution has proved beyond a reasonable doubt that the defendant has committed the crime as charged, it will be my job to decide what

the punishment will be. You should not try to guess what the punishment might be. It should not enter into your consideration at any time.

At times during the trial lawyers made objections to questions asked by other lawyers and to answers by witnesses. Do not draw any conclusions from such objections or from my rulings on the objections. These only related to the legal questions that I had to determine and should not influence your thinking. When I told you not to consider a particular statement, you were told to put that statement out of your mind, and you may not consider any statement in your deliberations which you were instructed to disregard. Finally, you should consider all the evidence in the light of your observations and experience in life.

INSTRUCTION NO. 2

There are two types of evidence from which you may properly find the truth as to the facts of a case. One is direct evidence. The other is circumstantial evidence, that is, the proof of facts from which other facts may reasonably be inferred. The law makes no distinction between direct and circumstantial evidence.

INSTRUCTION NO. 3

The evidence in this case consists of the sworn testimony of all the witnesses and all exhibits received into evidence.

You are to consider only the evidence in this case and reasonable inferences therefrom. An inference is a deduction or conclusion which reason and common sense lead the jury to draw from facts which have been proved.

INSTRUCTION NO. 4

You may have to decide what testimony to believe. You should carefully consider all of the testimony given and the circumstances under which each witness has testified.

Consider each witness' knowledge, motive, state of mind, demeanor, and manner while on the stand. Consider the witness' means of knowledge, ability to observe, and strength of memory. Consider also any relationship each witness may have to either side of the case; the manner in which each witness might be affected by the verdict; and the extent to which, if at all, each witness is either supported or contradicted by other evidence in the case. You should consider all facts and circumstances shown by the evidence which affects the credibility of the witness' testimony.

You may believe all of the testimony of a witness, or part of it, or none of it.

INSTRUCTION NO. 5

The mere number of witnesses appearing for or against a certain proposition does not in and of itself prove or disprove said proposition.

INSTRUCTION NO. 6

In this case you have heard out-of-court statements of [Ca.M.], which were admitted into evidence. You are instructed that it is for you to determine the weight and credit to be given these statements. In making this determination, you shall consider the age and maturity of the child, the nature of the statements, the circumstances under which the statements were made, and any other evidence that has been admitted that you choose to consider for this purpose.

INSTRUCTION NO. 7

The defendant is never compelled to testify, and the fact that he does not cannot be used as an inference of guilt and should not prejudice him in any way.

INSTRUCTION NO. 8

You are instructed not to allow gender bias or any kind of prejudice based upon gender to influence your decision.

INSTRUCTION NO. 9

In this case a separate offense is charged against the defendant in each count of the information. Each count charges a separate and distinct offense and the evidence and the law applicable to each count should be considered separately, uninfluenced by your decision as to any other count. The fact that you may find the defendant guilty or not guilty of one of the offenses charged should not control your verdict as to any other offense charged.

The defendant may be found guilty or not guilty of any one or all of the offenses charged.

INSTRUCTION NO. 10

The defendant, Miguel Angel Pena-Rodriguez, is charged with committing the crimes of Attempted Sexual Assault on a Child, Unlawful Sexual Contact, and Harassment (2 counts), in Arapahoe County, Colorado, on or about May 13, 2007.

The Defendant has pleaded not guilty to the charges.

INSTRUCTION NO. 11

The charges against the defendant are not evidence.

INSTRUCTION NO. 12

Every person charged with a crime is presumed innocent. This presumption of innocence remains with the defendant throughout the trial and should be given effect by you unless, after considering all of the evidence, you are then convinced that the defendant is guilty beyond a reasonable doubt.

The burden of proof is upon the prosecution to prove to the satisfaction of the jury beyond a reasonable doubt the existence of all of the elements necessary to constitute the crime charged.

Reasonable doubt means a doubt based upon reason and common sense which arises from a fair and rational consideration of all of the evidence, or the lack of evidence, in the case. It is a doubt which is not a vague, speculative, or imaginary doubt, but such doubt as would cause reasonable people to hesitate to act in matters of importance to themselves.

As to each count, if you find from the evidence that each and every element has been proven beyond a reasonable doubt, you will find the defendant guilty as to that count. If you find from the evidence that the People have failed to prove any one or more of the elements of any count beyond a reasonable doubt, you will find the defendant not guilty as to that count.

INSTRUCTION NO. 13

A crime is committed when the defendant has committed a voluntary act prohibited by law accompanied by a culpable mental state. Voluntary act means an act performed consciously as a result of effort or determination. Culpable mental state means intentionally or knowingly, as explained in this instruction. Proof of the commission of the act alone is not

sufficient to prove that the defendant had the required culpable mental state. The culpable mental state is as much an element of the crime as the act itself and must be proven beyond a reasonable doubt, either by direct or circumstantial evidence.

A person acts "with intent" when his conscious objective is to cause the specific result proscribed by the statute defining the offense. It is immaterial whether or not the result actually occurred.

A person acts "knowingly" with respect to conduct or to a circumstance described by a statute defining an offense when he is aware that his conduct is of such nature or that such circumstance exists. A person acts "knowingly" with respect to a result of his conduct when he is aware that his conduct is practically certain to cause the result.

INSTRUCTION NO. 14

The elements of the crime of Attempted Sexual Assault on a Child are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. attempted to knowingly,
   a. subject another not his or her spouse,
   b. to any sexual contact, and
4. that person was less than fifteen years of age, and
5. the defendant was at least four years older than that person,
6. at the time of the commission of the act,

7. without the affirmative defense described in Instruction No. 19.

After considering all of the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of Attempted Sexual Assault on a Child.

After considering all of the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of Attempted Sexual Assault on a Child.

INSTRUCTION NO. 15

"Attempt" as used in the Instructions for Attempted Sexual Assault on a Child requires a substantial step toward the commission of that offense. A substantial step is any conduct, whether act, omission, or possession, which is strongly corroborative of the firmness of the actor's purpose to complete the commission of the offense.

INSTRUCTION NO. 16

The elements of the crime of Unlawful Sexual Contact are:

1. That the defendant,
2. in the State of Colorado, at or about the date and place charged,
3. knowingly subjected a person to any sexual contact,
4. with knowledge that that person did not consent,
5. without the affirmative defense described in Instruction No. 19.

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of Unlawful Sexual Contact.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of Unlawful Sexual Contact.

INSTRUCTION NO. 17

Certain words have certain definitions under the law. The following words have the following meanings in these instructions:

"Sexual Contact" means the intentional touching of the victim's intimate parts by the actor, or of the actor's intimate parts by the victim, or the intentional touching of the clothing covering the immediate area of the victim's or actor's intimate parts if that sexual contact can reasonably be construed as being for the purposes of sexual arousal, gratification, or abuse.

"Intimate Parts" means the external genitalia or the perineum or the anus or the pubes or the buttocks or the breast of any person.

"Consent" means cooperation in act or attitude pursuant to an exercise of free will and with knowledge of the nature of the act. A current or previous relationship shall not be sufficient to constitute consent. Submission under the influence of fear shall not constitute consent.

INSTRUCTION NO. 18

The elements of the crime of Harassment are:

1. That the defendant,

2. in the State of Colorado, at or about the date and place charged,
3. with intent to harass, annoy, or alarm another person,
4. touched a person or subjected her to physical contact,
5. without the affirmative defense described in Instruction No. 19.

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of Harassment.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of Harassment.

INSTRUCTION NO. 19

It is an affirmative defense to each of the crimes charged that the defendant was not at the place of the crime at the time of its commission and that he was in fact at another place. This constitutes the affirmative defense of alibi.

As noted in previous instructions, the prosecution has the burden of proving each of the elements of each crime charged beyond a reasonable doubt, and has the burden of proving the absence of the affirmative defense of alibi beyond a reasonable doubt.

INSTRUCTION NO. 20

Once you begin your deliberations, if you have a question about the evidence in this case or about the instructions or verdict forms that you have been given, your Foreperson should write the question on a piece

of paper, sign it and give it to the bailiff who will bring it to me.

I may confer with the attorneys as to the appropriate way to answer your question. However, there may be some questions that, under the law, I am not permitted to answer. If it is improper for me to answer the question, I will tell you that. Please do not try to guess about what the answer to your question might be or why I am not able to answer a particular question

INSTRUCTION NO. 21

Once the closing arguments are completed, the bailiff will escort you to the jury room. Upon reaching the jury room, you are to select one of your members to be the foreperson of the jury. Your foreperson will preside over your deliberations and shall sign whatever verdict you reach.

The verdict must represent the considered judgment of each juror. In order to return a verdict, it is necessary that each juror agree to it. Your verdict must be unanimous.

Only one verdict shall be returned signed for each count, and it and the unsigned verdicts and these instructions shall remain in the possession of your foreperson until such time as they are called for in open court. Upon reaching a verdict, you will inform the bailiff of this Court, who in turn will notify the Court, and you will remain in your jury room until called into the Courtroom.

You will be provided with four verdict forms, one form for each count. Each form will contain a section for each verdict. When you have unanimously agreed upon your verdicts, you will select the section on each

form which reflect your verdicts, and the foreperson will sign them as the Court has stated.

The forms of verdict you will receive will now be read to you. You are further instructed that no inferences are to be drawn from the order in which the Court reads the verdicts.

ADJOURNMENT INSTRUCTION

As you have previously been instructed, there are certain admonitions and orders that continue to govern your conduct in this trial during your deliberations:

First, you are not to discuss this case among yourselves, except when the entire jury is together in the jury room for deliberations. You should also not discuss this case with anyone else. In fairness to the parties to this lawsuit, you should keep an open mind through the trial, and you should reach your decision only during your final deliberations.

Second, you may not permit any third person to discuss the case in your presence. If anyone attempts to do so, please leave their presence immediately and report that fact to the bailiff.

Third, do not speak with any attorney, any witness, or any party in the case.

Fourth, do not attempt to gather any information on your own. Do not engage in any outside reading on this case. Do no attempt to visit any places mentioned in the case. Do not use any resource material, including the Internet, to gather any information on issues in this case. Do not in any way try to learn about the case outside the jury room.

Fifth, do not read about the case in the newspapers, or listen to radio or television or any media broadcast about the trial. You must base your verdict solely on the evidence presented at trial.

In order that the Court may keep a record of the fact that you have been reminded of these admonitions,

each juror must sign below indicating that you have read, understand and will abide by these admonitions.

You are to reassemble in the jury room to continue your deliberations on

Friday, February 26, 2010, at 8.30 a.m.

By the Court:

/s/ John L. Wheeler
JOHN L. WHEELER
District Court Judge

I have read and understand these admonitions on February 25, 2010:

[Signatures of twelve jurors.]

REPORTER'S TRANSCRIPT

APPEARANCES

FOR THE PEOPLE: AMANDA K. KRUSEY, ESQ.

FOR THE DEFENDANT: MICHAEL W. MEYRICK, ESQ.

KELLY C. CHERRY, ESQ.

THE DEFENDANT APPEARS IN PERSON ON BOND.

This matter comes on for trial before the HONORABLE JOHN L. WHEELER, Judge of the District Court, on [Friday, February 26, 2010 (according to court reporter's attestation)].

This is a complete transcript of the proceedings had in the case at that time.

* * *

[2] THE COURT: Back on the record in 07CR2311. Counsel are present. Defendant is present.

We got a note from the jury which I attached here, unsigned, unfortunately. We'll mention that to the jury, anything they send out has to be signed by the foreperson. "The jury is hung, Judge."

That's a proposal of what I would read to them. I'm not going to send anything in to them. I want to have them in here and read it to them. That's 38:14, pretty standard admonition, the modified *Allen*. The only question would be if I read the last – that bracketed paragraph. I usually do not read that the first time I have jurors in here to kick them in the pants a little. I don't tell them that I will hang the jury. And if I feel if

they come back another time and I feel they are truly not ready, I will tell them that as well, but not this time. So I would just tell them they are going to go back and give them the lunch menu.

MR. MEYRICK: You'll bring them out to do this?

THE COURT: Yes. I've only had this two times before. I only had one hung jury before, one time [3] that I had to send a notice back, but I did that in writing. This seems a little different. I want to look them in the face.

MR. MEYRICK: Okay.

THE COURT: Kick them in the butt a little. (The following proceedings were had within the presence of the jury:)

THE COURT: Thank you. Please be seated.

Thank you, ladies and gentlemen. Since it appears to the Court that your deliberations have been somewhat lengthy without a verdict being reached, the Court wishes to suggest a few thoughts which you should consider in your deliberations, along with the evidence in the case and all of the instructions previously given.

It is your duty as jurors to consult with one another and to deliberate with a view to reaching a verdict, if you can do so without doing violence to individual judgments.

Each of you must decide the case for yourself. But do so only after an impartial consideration of the evidence with your fellow jurors. In the course of your deliberations do not hesitate to reexamine your own views and change your opinion if convinced that it is erroneous. But do [4] not surrender your honest conviction as to the weight or effect of evidence solely

because of the opinion of your fellow jurors or for the mere purpose of reaching a verdict.

You are not partisans. You are judges, judges of the facts. Your sole interest is to ascertain the truth from the evidence presented in the case.

You will now return with the bailiff to the jury room to continue with your deliberations. Thank you.

(The following proceedings are had outside the presence of the jury:)

THE COURT: We're going to give them a lunch menu right now. As she's going in there, she will tell them that. And see what we get.

We're going to recess for just a few minutes.

* * *

4:00 p.m.

THE COURT: We're reconvened in 07CR2311, People versus Miguel Pena-Rodriguez.

I got a note from the jury that they have reached verdicts on three of the four charges, and cannot reach a verdict on the fourth charge, whichever that is, signed by the foreperson. I'm not sure that it would serve any great purpose for [5] me to give them the *Allen* instruction again. They got very loud for a while. We had to quiet them down, and then this came out.

So I think that that would indicate that they've probably done as well as they could do. And my intent would be to bring them out, inquire of them if they feel that they are – I'll ask the foreperson if they feel they are hopelessly deadlocked on this fourth charge, and ask them if they feel they could make any progress towards unanimous verdict if they were allowed to continue to deliberate. My guess is they will say no, but I will ask each one of them. If that's the case, then

we'll take – I will then, and only then, take the verdict forms, and we'll find out what the three of the four are, and apparently then the fourth will be hung in mistrial. Any suggestions other than that?

MS. KRUSEY: No, Your Honor.

MR. MEYRICK: No, Your Honor.

THE COURT: Let's bring them in.

(The following proceedings were had within the presence of the jury)

THE COURT: Thank you, ladies and gentlemen. Mr. Foreperson, in your opinion, as foreperson of the jury, would further deliberations by this [6] jury likely result in a unanimous verdict on the fourth of the four counts?

FOREPERSON: No, Your Honor.

THE COURT: Do you believe that the jury is now hopelessly deadlocked?

FOREPERSON: Yes, Your Honor.

* * *

[10] THE COURT: The Court notes that the jury has now been deliberating for approximately 12 hours, yesterday and today. The Court notes that – I did not note the time, but that earlier today the jury was instructed in accordance with Colorado jury instruction – criminal instruction 38:14.

The Court now finds that the jury in this case is hopelessly deadlocked as to one of the four counts, and that further deliberations by this jury would be to no avail on that count, and that there's [11] no reasonable probability of agreement by this jury.

Accordingly, at this time the Court declares a mistrial as to that count. And as to that count, the jury will have no further deliberations.

At this time, I'll accept the verdict forms from the foreperson.

(Verdict forms tendered to the Court.)

THE COURT: Mr. Pena-Rodriguez, the verdict of the jury is this: As to Count One, Attempted Sexual Assault on a Child, this is the count on which the jury has mistried and found no verdict.

Count Two, Unlawful Sexual Contact. (2), We, the jury, find the defendant, Miguel Angel Pena-Rodriguez, guilty of Unlawful Sexual Contact.

Count Three, Harrassment as to [Ca.M.] (2), We, the jury, find the defendant, Miguel Angel Pena-Rodriguez, guilty of Harassment.

And Count Four, Harassment as to [J.C.], (2) We, the jury, find the defendant, Miguel Angel Pena-Rodriguez, guilty of Harrassment.

* * *

DEFENDANT'S MOTION FOR JURY CONTACT INFORMATION AND MOTION FOR EXTENSION OF TIME FOR A NEW TRIAL UNDER RULE 33

Defendant, MIGUEL PENA-RODRIGUEZ, through his lawyers, Michael W. Meyrick and Kelly Cherry Law Offices of Michael Meyrick, P.C., moves this Court for an Order directing the Jury Commissioner to provide the Defendant with contact information for the jurors in this matter and for an enlargement of time to file for a new trial if necessary. As grounds therefore counsel states:

1. Allegations have been made that there was contact in the hallway between one of the witnesses in this matter and a juror. In an attempt to investigate that allegation Counsel requires jury contact information and an enlargement of time in order to conduct appropriate interviews.

2. Allegations have been made that some members of the jury used ethnic slurs in the course of deliberations that were directed against the Defendant and/or toward the sole witness for the defense. During *voir dire* defense counsel inquired of the jury panel whether any prospective juror harbored any bias that might render him or her unfit to serve on this particular case. There were no affirmative responses. Counsel requires jury contact information and an enlargement of time in order to investigate whether there was a failure to disclose such information during *voir dire*.

3. Rule 33 provides that any motion for a new trial must generally be brought within 15 days of the verdict. However the Rule provides for an enlargement of time, at the discretion of the trial court, where application is made within the 15 day period.

WHEREFORE, the Defendant moves this Court for an Order:

a. Directing the Jury Commissioner to provide contact information for the jurors seated in this case to defense counsel for the purpose of conducting this investigation; and

b. An Order granting an enlargement of time for a period of 30 days from the date such requested contact information is provided to defense counsel.

Respectfully submitted this 12th day of March 2010.

LAW OFFICES OF
MICHAEL MEYRICK, P.C.
/s/ Michael W. Meyrick
Michael W. Meyrick, #29748
Kelly Cherry, #40105
Attorneys for the Defendant

ORDER – Re: Defendant's Motion for Jury Contact and for Enlargement of Time for Motion for New Trial – Preliminary Order

Having reviewed the "Defendant's Motion for Jury Contact Information and Motion for Extension of Time for a New Trial Under Rule 33," and otherwise being fully advised of the current status of the Motion, the Court rules as follows:

1. The Court considers that defendant's Motion for juror contact information and an enlargement of time to file a formal motion for new trial is governed by the same rules and procedures under Colo.R.Crim.P. 33(c) that govern a motion for new trial.

2. As required under Rule 33(c), before the Court will consider granting contact with deliberating jurors regarding unsubstantiated juror misconduct, the Court requires one or more affidavits to be submitted by the defendant regarding the "who, what, when, and where" of the allegations of juror misconduct. These affidavits must include all information about who provided this information, to whom the information was provided; when the information was provided, under what circumstances the information was provided, and of course, the exact substance of the information provided.

3. Affidavits from the defendant must be filed within fifteen (15) days of this Order.

4. After affidavits are submitted by the defendant, the Court will permit the prosecution a period of fifteen (15) days within which to respond in writing to defendant's request to contact the jurors. After that period (whether or not a response from the prosecution

is received), the Court will rule on the defendant's Motion. Please forward a copy of the affidavits and any response to the Court by e-mail, in addition to "hard" copy filing: john.wheeler@judicial.state.co.us

5. The running of the period for defendant to file a motion for new trial will be tolled for its full period under Rule 33(c) until the Court rules on the defendant's current Motion. The Court will address any additional enlargement of that period in its Order on the current Motion to contact deliberating jurors.

By Order of the Court this 12th day of March, 2010.

/s/ John L. Wheeler
John L. Wheeler
District Court Judge

Cc: All parties

DEFENDANT'S MOTION FOR DISCLOSURE OF JURY INFORMATION

COMES NOW the Defendant MIGUEL PENA-RODRIGUEZ, through his lawyers, Michael Meyrick and Kelly Cherry, who move this Court for an Order authorizing the jury commissioner to disclose juror contact information to defense counsel for the purpose of determining whether a motion for a new trial is appropriate under Rule 33 of the Colorado Rules of Criminal Procedure. As grounds therefore counsel states:

1. The Court, by its Order of March 12, 2010, has permitted an enlargement of time to allow the defense to make this motion supported by the appropriate affidavits.

2. The Defendant makes this motion in order to investigate allegations of potential juror/witness misconduct and/or a failure to disclose material information by certain jurors as set forth in the attached affidavits.

3. On February 26, 2010, after the verdict in this case, the Defendant's wife, Barbara Pena, disclosed to defense counsel that after the testimony of the State's witness and lead investigator, Deputy Jeremy Nesvold of the Arapahoe County Sheriffs Department, she observed Deputy Nesvold and another non-witness Deputy Sheriff engaging in a conversation with one of the jurors in the hall outside the courtroom. The cross-examination of Deputy Nesvold focused, in large part, on the failure of police to attempt to obtain any fingerprint evidence at the crime scene. Ms. Pena overheard the juror ask the deputies

whether it was common practice to collect fingerprint evidence in these types of cases. She was unable to hear a response because she was walking away from the place where the conversation was taking place but after walking down the hallway she turned and observed that the juror and the deputies were still engaged in conversation several seconds later. Exhibit 1, Affidavit of Barbara Pena.

4. Notwithstanding the lack of juror contact information, after the trial defense counsel attempted to have a defense investigator Interview Deputy Nesvold about the alleged juror contact in the hall. Deputy Nesvold declined to be interviewed. Exhibit 2, Affidavit of Kristin DiDonato.

5 Subsequent to the verdict, co-counsel Kelly Cherry interviewed members of the jury. After most of the jury had left the room, two of the jurors remained behind and told Ms. Cherry that some of the other jurors, in the course of deliberations, expressed a bias against the Defendant and his alibi witness because the Defendant and witness were Hispanic. Exhibit 3, Affidavit of Kelly Cherry.

6. The proper investigation of these matters necessitates the release of juror contact information.

7 Any contact between a witness and a juror, if it occurred, would have been a violation of the Court's order to the jury. Any extraneous information that a juror sought, obtained or shared with others is the proper subject of an inquiry into juror misconduct. Rule 606 (b) Colorado Rules of Evidence. *Stewart v, Rice*, 47 P.3d 316 (Colo. 2002).

8. The United States Constitution, Amendments VI, XIV, and Colorado Constitution, Article H, Sections 16 and 25 guarantee a defendant a right to a fair trial. The right to an impartial jury is implicit in the constitutional right to a fair trial. *Morrison v. People*, 19 P.3d 668 (Colo, 2000).

9. Voir Dire is designed to ferret out jurors whose, "beliefs... interfere with a party's right to a fair trial." *Black v. Waterman*, 83 P.3d 1120 (Colo. App. 2003). During the Voir Dire process defense counsel inquired of the jury panel if any juror harbored any bias which might cause the juror to be unfair in this particular case. No potential juror indicated that he or she did. A bias that is based on ethnicity is one that should have properly been disclosed.

10. An essential element of a fair trial is the right to challenge jurors for cause. *People v. Harlan*, 8 P.3d 448 (Colo. 2000). If a juror deliberately misrepresents or fails to disclose information potentially relevant to a preemptory challenge or knowing conceals a bias, that fact alone may require a new trial as it shows the juror is likely unabale to render a fair or impartial verdict. *Black v. Waterman*, 83 P.2d 1130, 1137 (Colo. App. 2003) citing *People v. Dunoyair*, 660 P.2d 890 (Colo. 1983).

WHEREFORE the Defendant moves this Court for an Order to the Jury Commissioner directing that the Commissioner disclose to defense counsel contact information for all jurors seated in the above captioned matter to enable counsel to conduct the appropriate investigation into whether a Motion for a New Trial is warranted pursuant to Rule 33,

Respectfully submitted this 22nd day of March 2010.

LAW OFFICES OF MICHAEL MEYRICK, P.C.

/s/ Michael W. Meyrick
Michael W. Meyrick #29748
Kelly Cherry, #40105
Attorneys for the Defendant

EXHIBIT 1

AFFIDAVIT OF BARBARA PENA

I, Barbara Pena, depose and say:

1. I am over the age of eighteen.

2. I am married to the Defendant in this matter, Miguel Angel Pena-Rodriguez.

3. I was present in the courtroom during the trial in the above captioned matter.

4. On Wednesday, February 24, 2010, 1 was present in the courtroom during the testimony and cross examination of Deputy Nesvold of the Arapahoe Sheriff s Department.

5. During that cross examination, one of the primary issues was the lack of fingerprint evidence in the case and Deputy Nesvold's explanation about that.

6. At the end of Deputy Nesvold's testimony the jury was released for the day.

7. Deputy Nesvold left the courtroom and went out into the hallway.

8. I went out into the hallway shortly thereafter on my way to the restroom.

9. Deputy Nesvold was standing in the hallway speaking with one of the deputy sheriffs who was not a witness but who had been sitting in the back of the courtroom for much of the trial.

10. When I walked out into the hallway I saw one of the male jurors who was wearing a maroon plaid shirt, blue jeans and boots speaking with Deputy Nesvold and the other sheriff

11. I heard the juror say, "I have a general question. How often do you take fingerprints in these types of cases?"

12. I did not hear the response from Deputy Nesvold or other sheriff because I kept walking toward the restroom but I turned around severe seconds later to see that they were still conversing as I walked toward the restroom.

13. On Friday evening, February 26, 2010, after the verdict and after we left the courthouse I told my husband that he should tell his lawyers about this incident and he sent a text message on his phone to Kelly Cherry.

/s/ Barbara Pena
Barbara Pena

EXHIBIT 2

I, Kristen Di Donato, depose and say:

1. I am over the age of eighteen.

2. I am the legal investigator for the defense in the above caption matter.

3. At the request of the defense attorneys in this matter, I attempted to contact Deputy Jeremy Nesvold of the Arapahoe County Sheriff's Office, to interview him and determine whether he had any contact with any juror in the hallway while the trial was in progress.

4. I left three voice messages for Deputy Nesvold in an attempt to make arrangements to speak with him.

5. On March 15, 2010, at approximately 7:00 am, Deputy Nesvold left a message on my cell phone declining to speak with me about this matter and telling me that any questions for him would have to be directed to the Office of the District Attorney or the/Office of the County Attorney.

/s/ Kristin DiDonato
Kristin DiDonato
Investigator

EXHIBIT 3

AFFIDAVIT OF KELLY C. CHERRY

Kelly C. Cherry, co-counsel of record for the Defendant in this matter, duly sworn upon her oath, states as follows:

1. On February 26, 2010, after the jury verdict was returned in this matter, I entered the jury room and began discussing the trial with the jurors.

2. During that discussion but after most of the jurors had left the room, two remaining jurors informed me that some of the other jurors expressed a bias toward the Defendant and the alibi witness because they were Hispanic.

3. After leaving the courthouse on the evening of February 26, 2010, I received a text message from the Defendant informing me that during the trial he saw two Sheriffs Deputies speaking with one of the jurors about the topic of fingerprinting.

/s/ Kelly C. Cherry
Kelly C. Cherry, #40105

ORDER – Re: Defendant's Motion for Disclosure of Jury Information - I

Having reviewed the "Defendant's Motion for Disclosure of Jury Information," including the response, and otherwise being fully advised of the current status of the Motion, the Court rules as follows:

A. Factual and Procedural Background.

1. The following scenario resulted in the jury's verdict against the defendant:

a. On February 23, 2010, the jury venire filled out the written juror questionnaire which included, *inter alia,* the following question:

> 17. Is there anything about you that you feel would make it difficult for you to be a fair juror in this case? __ If yes, please explain.

b. The jury venire was then sworn by the Court and *voir dire* began. During *voir dire,* both counsel and the Court inquired as to the prospective jurors' ability to render a fair and unbiased verdict in this case, and each juror who expressed any hesitation regarding his/her ability to satisfy this requirement was subjected, not only the Court's further inquiry, but to inquiry by counsel.

c. During trial, following question was asked by the jury (through the Court) of Deputy Jeremy Nesvold, and Deputy Nesvold answered to the jury:

> Why didn't you take fingerprints?

d. At the conclusion of *voir dire,* the Court administered the following oath to the thirteen jurors selected for the jury:

> Do you solemnly swear or affirm under penalty of law that you and each of you will well and truly try the matter at issue between the People of the State of Colorado and Miguel Pena-Rodriguez, the defendant, and render a true verdict, according to the evidence?"

e. Each juror answered in the affirmative and was then impaneled.

f. On February 25, 2010, at the conclusion of closing arguments, the alternate juror (#10) was discharged, and the remaining twelve jurors began deliberation at approximately 11:20 a.m.

g. At approximately 4:00 p.m. on February 26, 2010, the jury returned with "guilty" verdicts on Count 2 – Unlawful Sexual Contact, and Counts 3 and 4 – Harassment against two victims. The jury could not reach a unanimous verdict on Count 1 – Attempted Sexual Assault on a Child, and the Court declared a mistrial on that Count. After reading the verdicts, the Court polled each juror at the request of counsel, and each juror orally affirmed that these were their individual verdicts.

h. The jury was then discharged with the Court's instruction under COLJI- Crim. 1:06:

> You have now completed your duties as jurors in this case and are discharged with the thanks of the court. The question may arise whether you may now discuss this case with the lawyers, defendant, or other persons. For your guidance the court instructs you that whether you talk to anyone is entirely your own decision. It is proper for others to discuss the case with

you and you may talk with them but you need not. If you talk to them you may tell them as much or as little as you like about your deliberations or the facts that influenced your decision. If any person persists in discussing the case over your objection, or becomes critical of your service either before or after any discussion has begun, please report it to me.

2. The following factual scenario has occurred since the entry of the verdict on February 26, 2010:

a. On March 11, 2010, the defendant filed "Defendant's Motion for Jury Contact Information and Motion for Extension of Time for a New Trial Under Rule 33," and the Court issued its "Preliminary Order" on March 12, 2010, requesting affidavits in support of defendant's Motion, in accordance with Colo.R.Crim.P.33(c) within fifteen days of the Order.

b. On March 23, 2010, defendant filed his amended "Defendant's Motion for Disclosure of Jury Information," including the following information:

(1) Affidavit of Barbara Pena (wife of the defendant) indicating:

(a) Observing an unidentified male juror state to Deputy Jeremy Nesvold (who had just concluded his testimony in this case): "I have a general question. How often do you take fingerprints in these types of cases?"

(b) Ms. Pena did not overhear Deputy Nesvold's response, but did observe that they continued conversing for a short time after the initial question.

(2) Affidavit of Kelly C. Cherry, Esq. (co-counsel for the defendant):

(a) While interviewing two unidentified jurors after the verdict, Ms. Cherry reported that "some of the other jurors expressed a bias toward the Defendant and the alibi witness because they were Hispanic."

(b) Ms. Cherry received a text message from the defendant confirming his wife's statement that he also saw Deputy Nesvold speaking with a juror about fingerprinting.

(3) Affidavit of Kristen Di Donato (investigator for the defendant):

(a) Ms. Di Donato reported that Deputy Nesvold had declined to speak with her about the issue raised by Ms. Pena and the defendant concerning a conversation with a juror, and directed her to the District Attorney's office.

B. Standard of Review.

3. Three distinct issues are raised by the post-verdict Motion of the defendant: (1) invading jury deliberations in general; (2) introduction of extraneous information into jury deliberations; and (3) racial bias of individual jurors. C.R.E. 606(b) addresses these issues in a general manner:

> Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon his or any other juror's mind or emotions as influencing him to assent to or dissent from the verdict or indictment or concerning his

> mental processes in connection therewith. But a juror may testify about (1) whether extraneous prejudicial information was improperly brought to the jurors' attention, (2) whether any outside influence was improperly brought to bear upon any juror, or (3) whether there was a mistake in entering the verdict onto the verdict form. A juror's affidavit or evidence of any statement by the juror may not be received on a matter about which the juror would be precluded from testifying.
>
> (1) Invading jury deliberations.

4. Long before adopting C.R.E. 606(b), Colorado law protected the sanctity of juror deliberations: "Generally, after leaving the courtroom, jurors could not testify to any matter concerning the intent or meaning of their verdict or their thought processes in reaching it." *Stewart v. Rice*, 47 P.3d 316, 321 (Colo. 2002)(citing 19th Century Colorado cases).

> CRE 606(b) has three fundamental purposes: to promote finality of verdicts, shield verdicts from impeachment, and protect jurors from harassment and coercion.
>
> These purposes also underlie other Colorado law protecting the jury process. While a jury may change or modify its verdict up to the point the trial court accepts the verdict and discharges the jury, the court may not recall the jurors for this purpose once they leave the judge's control. "This rule helps to ensure that jury verdicts will not be tainted by any outside influence ... and promotes the finality of verdicts."

Id. at 322 (citations and footnote omitted). "During post-trial and appellate proceedings, courts must view the jury's verdict in the light most favorable to it." *Id.*

> CRE 606(b) protects the jurors in performing their public service and their post-verdict privacy. It acts to restrain disappointed litigants. The law presumes that jurors have followed the court's instructions and have discharged their duties faithfully.

Id. "Under CRE 606(b), as with our common law, we have excluded juror testimony or affidavits divulging juror deliberations, thought processes, confusion, mistake, intent, or other verdict impeaching grounds." *Id.*

5. Notwithstanding the ability of counsel to discuss jury deliberations with a willing juror post-verdict pursuant to COLJI-Crim. 1:06, "none of this can become evidence unless one or both of the CRE 606(b) exceptions apply to the case." *Stewart v. Rice*, 47 P.3d at 325.

(2) Extraneous information.

6. The allegation of the jury's access to extraneous prejudicial information pursuant to C.R.E. 606(b) involves the following inquiry:

> These cases establish a two-part inquiry: first, a court makes a determination that extraneous information was improperly before the jury; and second, based on an objective "typical juror" standard, makes a determination whether use of that extraneous information posed the reasonable possibility of prejudice to the defendant.

> Answering this inquiry presents a mixed question of law and fact.

People v. Harlan, 109 P.3d 616, 624 (Colo. 2005).

7. The "typical juror" standard is intended to avoid inquiring into the actual effect of the information on juror deliberations (if any):

> Court inquiry into the improper introduction of extraneous information must comply with the narrow exception of CRE 606(b). Under CRE 606(b), the historical fact-finding of the trial court must focus on the circumstances surrounding the jury's exposure to outside information or influences and the nature of the information or influences to which it has been exposed. The court may not take into account testimony regarding the jury's deliberations, a juror's mental processes leading to his or her decision, or whether the extraneous information actually swayed any of the particular jurors' votes.

Id. at 625 (citation omitted).

8. "However, where the court is able to determine from the nature of the allegedly prejudicial extraneous information and the surrounding circumstances that the information is not inherently prejudicial, the court does not abuse its discretion in failing to question the jurors." *People v. Mollaun*, 194 P.3d 411, 418 (Colo. App. 2008).

(3) Juror bias.

7. The actual deliberations that occur among the jurors are protected from inquiry under C.R.E. 606(b)." *Stewart v. Rice*, 47 P.3d at 322. However, the failure of

a juror to disclose a bias so that a challenge for cause or a peremptory challenge may be exercised may permit additional inquiry post-verdict:

> The purpose of voir dire is to determine whether any potential juror has beliefs that would interfere with a party's right to receive a fair and impartial trial.
>
> If discovered during trial, a potential juror's failure to answer questions truthfully during voir dire may justify replacing the juror with an alternate or may require a mistrial. When mendacity is discovered only after the jury renders a verdict, a new trial may be warranted. However, untruthful answers on voir dire do not per se entitle a party to a new trial.
>
> When a juror deliberately misrepresents important information potentially relevant to a preemptory challenge or knowingly conceals a bias or hostility towards a party, that fact may necessitate a new trial because the juror's knowing misrepresentation or concealment alone shows that the juror is likely incapable of rendering a fair and impartial verdict. *People v. Dunoyair, supra.*
>
> If a juror's misrepresentation or nondisclosure was inadvertent, however, then the aggrieved party must show the nature of the misrepresented or undisclosed information "was such as to create an actual bias." Absent this showing, we presume the juror followed the instructions and based a decision on the evidence and the law.

Black v. Waterman, 83 P.3d 1130, 1146-1147 (Colo. App. 2003)(citations omitted). "A defendant has the right to exercise all of his peremptory challenges, and when a juror misrepresents or conceals material and relevant matters, that right, as well as the right to challenge for cause, is impaired." *Allen v. Ramada Inn, Inc.*, 778 P.2d 291, 293 (Colo. App. 1989).

> "Where ... a juror deliberately misrepresents important biographical information relevant to a challenge for cause or a peremptory challenge or knowingly conceals a bias or hostility towards the defendant, a new trial might well be necessary.... In such instances the juror's deliberate misrepresentation or knowing concealment is itself evidence that the juror was likely incapable of rendering a fair and impartial verdict in the matter."

People v. Dunoyair, 660 P.2d 890, 895 (Colo. 1983) (citation omitted).

8. Finally, where the trial court denies a party's challenge for cause based on bias, and the denial is held to be improper, a new trial is warranted because the party's ability to impanel a jury through the full use of all peremptory challenges is impaired, regardless of the effect of any actual bias which may occur during jury deliberations [which are protected under C.R.E. 606(b)]. *People v. Harlan*, 8 P.3d 448, 460 (Colo. 2000); *People v. Kriho*, 996 P.2d 158, 168 (Colo. App. 1999).

9. As noted above, however, the actual effect of juror bias, as with other types of information which may inappropriately affect jury deliberations, is not relevant to the Court's analysis under C.R.E. 606(b).

> In reaching this conclusion, we consider only those allegations in the affidavit which relate directly to the nature of the information. We do not consider those allegations which concern what use the jurors may have made of the information or the jurors' deliberations and mental processes generally.

Kendrick v. Pippin, 222 P.3d 380, 387 (Colo. App. 2009)(emphasis added).

C. Legal Analysis.

(1) Extraneous Information – Fingerprinting.

10. During trial, Deputy Jeremy Nesvold was questioned extensively on cross- and redirect examination about the ability to take fingerprints from the light switch in the women's restroom facility where the assault took place, and his decision not to take fingerprints in this case, and a member of the jury (through the Court) followed up with a similar question. The issues involved the following:

a. Based on the victim's testimony that the defendant shut off the lights when he entered the restroom, Deputy Nesvold was asked on cross-exam whether he attempted to take fingerprints from the light switch, and he testified that he did not.

b. On redirect examination, Deputy Nesvold testified that prints are generally not taken when the area is open to the public, such as a light switch in a public restroom.

c. On re-cross exam, Deputy Nesvold was asked whether fingerprints would be attempted to be taken from an area that he knew the assailant had

touched, even if that area was "public," and Deputy Nesvold testified: (1) He did not recall if the switch in the restroom was a "good surface" for prints; and (2) he did recall that the scene of the assault was under control and not a lot of people were around after the assault (to contaminate the scene).

d. In response to the juror's written question through the Court, Deputy Nesvold testified that a light switch surface was a "bad" surface in general, and that he simply did not try to lift a fingerprint from the switch.

11. The question overheard by Ms. Pena posed by the unidentified male juror to Deputy Nesvold following the conclusion of his testimony was (1) as a general matter, (2) how often fingerprints are taken in "this type" of cases (i.e., sexual assault).

12. Based on the nature of the question allegedly posed by the juror to Deputy Nesvold, and the extensive nature of the questioning of Deputy Nesvold at trial about the finger-printing issue, and the unequivocal response of Deputy Nesvold that he did not take prints for a variety of reasons, the Court finds that the nature of the allegedly prejudicial extraneous information and the surrounding circumstances warrant that the information is not relevant or inherently prejudicial to the defendant, *Mollaun*, 194 P.3d at 418, for the following reasons:

a. Although the Court would not have permitted the juror's "general fingerprinting in sexual assault cases" question to be asked of Deputy Nesvold while on the stand because such a question is not relevant to this case, the depth of questioning on that issue during direct and cross-examination was such that, in the Court's opinion, little, if any, question could possibly

be left in the jury's collective mind about Deputy Nesvold's reasons for not taking fingerprints from the light switch, regardless of what he might have done in other cases.

b. Hypothetically, if Deputy Nesvold had answered the juror's post-testimony question by stating that fingerprints in such cases are rarely or never taken, then he would either (1) confirm his prior testimony on the stand, thereby not prejudicing the defendant, or (2) be making a statement which was inherently unbelievable to the juror, thereby discrediting his testimony regarding the thoroughness of the police investigation to the juror; again not prejudicing the defendant.

c. If Deputy Nesvold had answered the juror's post-testimony question by stating that fingerprints in such cases are usually or always taken, then he would be making a statement which discredits his testimony regarding the thoroughness of the police investigation to the juror, thereby not prejudicing the defendant.

13. Under any scenario, the Court finds that the information which could have been communicated by Deputy Nesvold to the unidentified juror (if any) would not be inherently prejudicial to the defendant, and therefore the Court will not permit any additional investigation into the information communicated (if any).

14. Based on this legal and factual analysis, the Court DENIES defendant's Motion for access to juror information regarding the post-testimony conversation between Deputy Nesvold and the unidentified juror.

(2) Juror bias.

15. As noted above, the fact that the jurors interviewed by defendant's attorney indicated that "other jurors expressed a bias toward the Defendant and the alibi witness because they were Hispanic" is not relevant in a motion for new trial under C.R.E. 606(b) regarding whether such alleged bias *actually* affected the jury's deliberation. Actual juror deliberation may be not be opened for inspection, nor may post-verdict comments from jurors (pursuant to COLJI-Crim. 1:06) be used to invade the jury's *actual* deliberations. *Stewart v. Rice*, 47 P.3d at 322 & 325.

16. The inquiry underlying defendant's Motion is therefore limited to the determination of whether these unidentified jurors "deliberately misrepresent[ed] important information potentially relevant to a preemptory challenge or knowingly conceal[ed] a bias or hostility towards a party," thereby compromising defendant's ability to constitute a jury of his choice. *Black v. Waterman*, 83 P.3d at 1146-1147.

17. Based on this standard, and with the information available at this time, the Court is not prepared to provide the parties with "carte blanche" access to juror information in order to determine whether a violation of the defendant's due process rights has occurred. The Court will, however, proceed in the following manner in order to determine whether sufficient grounds under C.R.E. 606(b) exist in this case:

a. Attorney Cherry will supplement her Affidavit as to whether the two jurors with whom she had the reported discussion were male or female (in order that the Court may possibly limit the initial contact with jurors to one sex).

b. Attorney Cherry will then personally contact jurors in succession (with contact information

provided by the Court) to determine only which jurors she spoke with alone after the other jurors left, and without disclosing to any jurors the subject of that conversation (i.e., that other jurors had expressed racial bias).

(1) The Court understands the difficulty and delicacy of this limitation on Ms. Cherry's inquiry with the jurors, but that is why this task is delegated to Ms. Cherry, personally, and not to an investigator or co-counsel. Ms. Cherry has the singular knowledge of the conversation that will permit identification of these jurors.

(2) If the two subject jurors are identified before contacting all of the jurors, the contact procedure will stop immediately. Similarly, if the subject jurors are both male and female, when a juror of one sex is identified, all subsequent contacts will be of the opposite sex only.

c. Ms. Cherry will then secure affidavits from the two subject jurors which will include and be limited to the following information:

(1) Identification (male or female) of each of the jurors (with name, if recalled) who expressed opinions about the defendant and/or the alibi witness (Maclovio Chavez-Chavez) which the subject jurors considered to be biased.

(2) The two jurors' best recollection of exactly what each "biased" juror stated about the defendant and/or the alibi witness. [Note: The Court is not concerned about whether the two interviewed jurors *believed* that the statements made by the other jurors were biased, as their opinions are part of jury deliberations and cannot be part of the Court's analysis per

Stewart. The only relevant information is the actual statements made by the "biased" jurors.]

(3) The two jurors will be instructed by Ms. Cherry that they are under Court order not to speak to any other person about this matter.

18. Based on the information then presented to the Court by Ms. Cherry regarding the statements of the "biased" jurors, the Court will then enter further Orders regarding how the investigation into the allegations of juror bias will proceed, if at all.

19. The preceding procedure will proceed in the following manner:

a. Ms. Cherry's supplemented affidavit will be provided to the Court no later than Monday, May 3, 2010.

b. The Court will provide Ms. Cherry with juror contact information for the appropriate group of jurors (i.e., male, female, or all jurors) within two business days of receiving Ms. Cherry's supplemented affidavit.

c. Defendant (i.e., Ms. Cherry) will file a status with the Court within thirty (30) days of this Order. If additional time is needed to complete this procedure, a timely Motion for enlargement may be filed.

d. The Court requests that, in addition to filing all information regarding this issue in "hard copy" with the Clerk of the Court, the parties send all information to the Court directly at: john.wheeler@judicial.state.co.us.

By Order of the Court this 28th day of April, 2010.

/s/ John L. Wheeler
John L. Wheeler
District Court Judge

Cc: All parties

SUPPLEMENT TO AFFIDAVIT OF KELLY C. CHERRY

Kelly C. Cherry, co-counsel of record for the Defendant in this matter, pursuant to this Honorable Court's Order dated April 28, 2010, states that both jurors she spoke with after the verdict in this matter were female.

Respectfully Submitted,

/s/ Kelly C. Cherry
Kelly C. Cherry, #40105
Attorney for Defendant

ORDER – Re: Defendant's Motion for Disclosure of Jury Information – II

Having received the "Supplement to Affidavit of Kelly C. Cherry" in accordance with ¶ 19.a. of the Court's April 28, 2010 Order, the Court implements the second phase of that Order, pursuant to ¶ 19.b.:

> 19. The preceding procedure will proceed in the following manner:
>
> > b. The Court will provide Ms. Cherry with juror contact information for the appropriate group of jurors (i.e., male, female, or all jurors) within two business days of receiving Ms. Cherry's supplemented affidavit.

1. Defendant's counsel may pick up the juror identification information for the six (6) female jurors on Monday, May 3, 2010, in Division 206. This information will remain confidential to defendant's counsel (i.e., no disclosure to the defendant).

2. Defendant's counsel will then implement the procedures outlined in ¶ 17.b. and c. within the time frame set forth in ¶ 19.c. of the 4/28/10 Order.

By Order of the Court this 30th day of April, 2010.

/s/ John L. Wheeler
JOHN L. WHEELER
District Court Judge

Cc: All parties

REPORTER'S TRANSCRIPT

APPEARANCES:

For the People: MINDY KRUSEY, ESQ.

For the Defendant: MICHAEL MEYRICK, ESQ.

KELLY CHERRY, ESQ.

THE DEFENDANT APPEARS IN PERSON ON BOND.

This matter comes on for hearing before the HONORABLE JOHN L. WHEELER, Judge of the District Court, on Monday, May 3, 2010.

This is a complete transcript of the proceedings had in the case at that time.

[2] PROCEEDINGS, MONDAY, MAY 3, 2010

THE COURT: Calling 07CR2311, the People versus Miguel Pena-Rodriguez.

MS. KRUSEY: Mindy Krusey for the People.

MR. MEYRICK: Michael Meyrick and Kelly Cherry with Mr. Pena.

THE COURT: I just handed Ms. Cherry the second phase of the new trial information regarding names of the six female jurors, and by the Court's order last week – or the week before – regarding the parameters of the questions that may be asked and the information taken from who you identify are the two jurors that you spoke with. You're going to have to do it by telephone so you don't actually recognize them. I'm sure that could be done. As I indicated, the questions have to be quite circumspect as not to suggest to any of the other jurors that someone may

have said something that the two identified jurors believe was racially biased. But I don't want to start ringing bells with other jurors, obviously.

So once they are identified, that information will be gathered and turned in, and we'll proceed from there.

MS. CHERRY: I understand.

[3] THE COURT: All right. And I actually have a – or I've got hard copies just so we don't have to go through the mail process. I did e-mail them. These are hard copies of that last order that I sent out indicating that I would give you that envelope.

MS. CHERRY: Thank you, Your Honor.

THE COURT: I have received and reviewed the adult sex offender pre-sentence report. Has everyone gotten a copy of it?

MS. KRUSEY: Yes.

MR. MEYRICK: Yes, Your Honor.

THE COURT: Are there any additions, corrections, anything that needs to be added or subtracted from this that is not accurate, as far as you're aware?

MR. MEYRICK: Your Honor, it's my intention to move to continue the sentencing until this issue is resolved. My problem is that my appellate period is going to start running today if we sentence him today. And I've only got 45 days. I'm not sure we're going to resolve this. Even if we do, it may leave me a couple of days at the end of that.

THE COURT: Good point. As of today, there would be 30 days on my order running –

MR. MEYRICK: Right.

[4] THE COURT: – as far as gathering this information.

MR. MEYRICK: Yes.

THE COURT: That's pushing the appellate period pretty hard.

MR. MEYRICK: Yes.

THE COURT: What's your position?

MS. KRUSEY: Your Honor, that's fine. Our victims did not wish to be present for sentencing. We could set it over at the Court's convenience. And also, too, with regards to the hung counts, I would want to make a determination whether we're dismissing that, to see where this goes. I don't want to dismiss that count with any kind of prejudice until I know a new trial may happen.

THE COURT: Okay.

MS. KRUSEY: I wanted to make a brief record on a couple other points at the Court's pleasure.

With the first issue regarding Deputy Nesvolt, you're taking issue with that according to the Court's order. We did have an investigator from our office speak with Deputy Nesvolt regarding that issue. He prepared a memorandum. I provided that to counsel this morning. And if I may approach the Court, I'll provide a copy for the Court's record [5] for any future issues.

THE COURT: Thank you.

MS. KRUSEY: In summary, essentially states that he did recall a gentleman with a juror badge. He couldn't tell if it was from our jury or not. He couldn't remember what they looked like. A gentleman approached him, started to ask him something. He

said, "I can't talk to you," and walked away. He did state that he came over and was talking to myself. He can't remember, he may have mentioned to me about it. My recollection is, I don't remember him saying anything about that. I certainly – my common practice, if anything like that happens, would have brought it up to counsel and the Court if anything like that happened. I don't have any recollection of him saying that to me. He couldn't remember one way or the other according to the interview with the investigator.

The second issue, the People do have – I respect the Court's order – but the People do have some concern with essentially it's just defense counsel themselves making this juror contact. There's no one from my office – not myself or anyone involved in my office – that's going to be present during the conversations.

[6] And so we have an issue that's hanging in the balance of whether a defendant gets a new trial, potentially, and the only person having contact with these jurors at this point is defense counsel.

And, you know, I mean absolutely no disrespect in making this record that Ms. Cherry is an excellent attorney and she would be honest. It's concerning to myself it's only defense side that's having any of this contact. It's defense issue if he gets a new trial, which is a huge issue in this case.

THE COURT: Well, please rest assured we are in the second of three preliminary phases here. The first phase was the report by a juror concerning another juror in which the affidavit of the attorney was presented.

The second phase will be actually finding out what that first juror overheard only. That affidavit, as if it were the same information that was being transmitted

to Ms. Cherry. So, in my opinion, that would be at the same level of initial reporting. But it has to come from the juror. If based on that I determine that we need to go forward, you will have access to those jurors on the stand, and those jurors will then tell us as if they [7] had come forward initially saying – come forward to the Court, for instance, saying, "I heard this information," we would then have put them directly on the stand so everybody had access to them. Until I'm convinced that this is not someone – merely someone's opinion of an innocuous comment that was made, until I find out exactly what they heard, not what they interpreted – because we will not be invading the deliberations of the jury about opinions and interpretations – only what was said. And once they report to the Court what was said, then I'll make a determination if this was, as I say, something innocuous, in which case we'll go forward, or with sentencing. Or if it is something more serious, in which case we'll have those people on the stand, the people who actually said the comments. And if we have to have an intermediate step with the jurors who had reported it, we'll do that as well.

But we're truly in the preliminary phase of this. Please don't be concerned that you won't have access to them. I need to find out if they are going to be standing by what they believe they heard or not.

So with that said, I agree that – and by [8] default it appears no one is objecting to continuing this, and it's probably appropriate because, I think you're right, we would be burning appellate time, and we don't know if even 30 days will accomplish this. I'm confident Ms. Cherry is not going to take 30 days to do this, although you have that time. But as far as we get, we will do that.

We probably need to set a status, I would think, as opposed to actually resetting sentencing. Although if you don't have anyone coming in, it doesn't matter.

MS. KRUSEY: If we could set a status in case they change their mind. A lot of that is based on the work and trial schedules. They may change their minds.

THE COURT: Why don't we try to go out about 30 days then, just for a status. How about Thursday or Friday, June 3 or 4, any time. I don't think it will take long to figure out where we are.

MS. KRUSEY: Either of those work for me.

MS. CHERRY: I could do it the 3rd, but not the 4th.

MR. MEYRICK: The 3rd works for everybody, it appears.

THE COURT: What time? 8:30?

[9] MR. MEYRICK: Sure.

THE COURT: That would be perfect. If you could do a setting slip. They are under the podium.

And I will move as quickly as I can, as soon as I get anything, but please understand those yellow stickies are the dates that I will not be here. As of May 20th through June 2nd I'm not going to be here. So if it is possible for you to do what you need to do here to find these people, that would sure help me. Otherwise it's going to occur during the two weeks I'm gone.

MS. CHERRY: As soon as they are responsive – I don't think it will be a problem.

THE COURT: Anything else for Mr. Pena-Rodriguez?

MR. MEYRICK: No, thank you, Your Honor.

THE COURT: Thank you very much.

(The proceedings this date were concluded.)

SUBMISSION OF AFFIDAVITS

• Kelly C. Cherry, co-counsel for the Defendant in this matter, submits the attached Affidavits pursuant to this Honorable Court's Order dated April 28, 2010.

Respectfully Submitted,

/s/ Kelly C. Cherry
KELLY C. CHERRY
Attorney for Defendant

AFFIDAVIT OF [M.M.]

[M.M.], of lawful age and duly sworn upon her oath, states as follows:

1. I was a juror at the trial in the above-captioned matter.

2. During jury deliberations, one of my fellow jurors, [H.C.], made the following statement concerning the Defendant:

   a. "I think he did it because he's Mexican and Mexican men take whatever they want."

   b. Mr. [C] made other statements concerning Mexican men being physically controlling of women because they have a sense of entitlement and think they can "do whatever they want" with women.

/s/ [M.M.]
[M.M.]

AFFIDAVIT OF [L.T.]

[L.T.], of lawful age and duly sworn upon her oath, states as follows:

1. I was a juror at the trial in the above-captioned matter.

2. During the first day of jury deliberations, juror [H.C.] made statements concerning the race of the defendant. Paraphrased, those statements were as follows:

   a. He believed that the defendant was guilty because in his experience as an ex-law enforcement officer, Mexican men had a bravado that caused them to believe they could do whatever they wanted with women.

   b. He said that where he used to patrol, nine times out of ten Mexican men were guilty of being aggressive toward women and young girls.

   c. He said that he did not think the alibi witness was credible because, among other things, he was "an illegal."

Further the affiant sayeth naught.

REPORTER'S TRANSCRIPT

The Hearing in this matter commenced on Wednesday, June 3, 2010, before the HONORABLE JOHN WHEELER, Judge of the District Court.

APPEARANCES:

FOR THE PEOPLE: PATRYCE ENGEL, Deputy District Attorney

FOR THE DEFENDANT: JAMES O'CONNOR, Public Defender

[2] THE COURT: 2007-CR-2311, People versus Miguel Pena-Rodriguez.

MS. CRUSEY: Mandy Crusey for the People.

MR. MEYRICH: Michael Meyrich and Kelly Cherry for Mr. Pena-Rodriquez.

THE COURT: The question stands. Where do we stand?

MS. CHERRY: I submitted the e-mails last week to you and the district attorney.

THE COURT: I'm sorry, I just haven't gotten, wasn't able to get to them.

MS. CHERRY: That's fine, Your Honor. I think that Ms. Crusey's in the same position just returning from a vacation and not having reviewed them.

MS. CRUSEY: That's correct. I was just able to pull up the e-mail right now so I'm in the same boat.

THE COURT: What that does is trigger the response period and having just returned I can't – they did come in on the 28th or very close to that date. My recollection was we got – did I provide 15 days for

response or 30? I looked back last night into the record orders and now I can't remember.

MS. CHERRY: The order I've reviewed, Your Honor, I don't think has a date for response.

THE COURT: I thought I gave a period of time, [3] though.

MS. CRUSEY: I don't know if we discussed this stage of it, Your Honor, because we weren't really sure if there was going to be a response necessary. I think at this point I think it depended on what the affidavit said.

THE COURT: And you haven't had a chance to review it or at least enough of a chance. Let me just quickly run through this. I thought I provided a response period, not obviously a fixed date because you didn't know when it would be, but let me quick look here. Well, perhaps I didn't. I thought I did, guess I didn't. Well, how do you wish to proceed then, Ms. Crusey?

MS. CRUSEY: Your Honor, it would be the People's position that it's not necessary to delve any further into this issue so if you want us to file a written brief in regards to that or however you want us to respond.

THE COURT: Well, if you wish to file anything then that's fine, I'll review it. I haven't seen it yet, but I will review it and rule as quickly as I can.

MS. CRUSEY: I mean, I guess to clarify, I know when we were here before you had talked about kind of certain phases and the second phase may be that we [4] would pull these jurors actually into the courtroom and take testimony from them. It would be the People's position that it's not necessary to move on to

that phase, that based upon the affidavits this is not sufficient for a motion to do any further inquiry.

THE COURT: That's what I would be reviewing is that issue if we need to pull them in and I would make that decision and if you feel there's no – nothing left further to do than for me to look at the affidavits and make that decision, I'll do that and then if we do pull them in, of course we'll set that up and go forward in that manner.

MS. CRUSEY: I guess – I would like to, I guess, file a – I can't imagine it'd be very long but maybe something in writing why I don't believe it's necessary to pull the jurors in and Your Honor can review that and take it for what you will.

THE COURT: That's fine. What period would you like?

MS. CRUSEY: If I could have maybe two weeks to do that or is that too long?

THE COURT: I'd like to have it by the end of next week.

MS. CRUSEY: Okay.

THE COURT: I mean, that's the better part of two [5] weeks but I'd like to have it by Friday.

MS. CRUSEY: All right.

THE COURT: So it would be Friday the 11th, end of business.

MR. MEYRICH: Your Honor, if we could have just a few days to respond to that.

THE COURT: Sure, that's fine. Would you need later than, say, the 16th or 17th?

MR. MEYRICH: No.

THE COURT: All right. Let's say the 17th then. June 11th for any brief by the People and June 16th for a response by the defense and then I'll rule as quickly as I can after that as to whether we'll bring these people in.

MS. CHERRY: Your Honor, if I could just advise the Court, in speaking with one of the jurors it's my understanding that she is relocating soon to Texas, so I don't know if it's possible that if we do proceed to the second phase for her to be able to participate by telephone or some kind of phone correspondence.

THE COURT: That may work.

MS. CHERRY: Okay.

THE COURT: How soon?

MS. CHERRY: My understanding was it's within the next couple of weeks so I think if it goes as she plans [6] she'll be gone by the time we get to that point.

THE COURT: I should get that e-mail. And are there attachments to it?

MS. CHERRY: There are.

THE COURT: Okay. That's all I would need then because the hard copy hasn't been filed yet. Anything else we need to do today? Do we have a date when Mr. Pena-Rodruguez will be here or are we still waiving his appearance for these?

MR. MEYRICH: He is here.

THE COURT: Oh, he is here, I'm sorry. Standing right there, I'm sorry. Let's set this again for status and see if I have any information by the 16th. I'd say sometime the week of the 21st. We're going to be in trial so we would do it as early as we possibly can.

THE CLERK: 24th at 8:15.

THE COURT: June 24th at 8:15. I anticipate it'll be fairly quick. We may be picking a date then so be sure and bring your calendars.

MR. MEYRICH: Okay.

THE COURT: I'll have the written order by e-mail to you prior to that date. Anything else?

MR. MEYRICH: No, thank you, Your Honor.

THE COURT: Thank you very much.

REPORTER'S TRANSCRIPT

APPEARANCES:

For the People: MINDY KRUSEY, ESQ.

For the Defendant: MICHAEL MEYRICK, ESQ.

KELLY CHERRY, ESQ.

THE DEFENDANT APPEARS IN PERSON ON BOND.

This matter comes on for hearing before the HONORABLE JOHN L. WHEELER, Judge of the District Court, on Thursday, June 24, 2010.

This is a complete transcript of the proceedings had in the case at that time.

[2] PROCEEDINGS, THURSDAY, JUNE 24, 2010

THE COURT: Calling 07CR2311, the People versus Miguel Pena-Rodriguez.

MS. KRUSEY: Mindy Krusey for the People.

MR. MEYRICK: Michael Meyrick, appearing with the defendant.

MS. CHERRY: Kelly Cherry on behalf of the defendant.

THE COURT: And from what I see here, we have information in place for me to make this decision. Is that what the parties understand? As far as I've got, I have the affidavits from two female jurors, the parties have seen. And then I have three briefs. I've got the People's B-3 regarding juror bias, defendant's response brief. I just wanted to make sure because they are a little slow getting up here from the clerk's office.

If this is everything – actually, I reviewed it last night, but this is a serious enough matter that I feel it deserves written orders, so that if either side wishes to do something, it has something in writing rather than just ramblings from the bench.

I'll do this by the end of the weekend for sure. If I get to it tonight or tomorrow, I will. [3] But by the end of the weekend for sure.

So let's set a date probably as quickly as we can. It's not real quick on our calendar.

COURT CLERK: I have July 20th, afternoon, anytime in the afternoon. I can do July 19th probably, if I do it like three o'clock.

THE COURT: Depending on the order, if we need to speak with this gentleman, what would you anticipate? I've never done this before. I think it's done rarely. So rarely for someone on the bench for a long time, let alone someone on the bench three-and-a-half years, I'll have to look into that a little bit more. I'll deal with that in the order. I think that's the best way to do it, if that's the way this goes.

I will tell you, I've read everything. I'm still thinking about it. I'll make the decision in writing and e-mail it to each of you.

MR. MEYRICK: I can't do the 19th, but I could do the 20th.

THE COURT: I have no idea what the procedure is. I have yet to find anything about it.

MS. KRUSEY: And then also as far as any kind of argument on a motion for new trial, as far as my brief is concerned, I kind of felt we were putting [4] the cart before the horse, because one had never been filed.

So if this is set for 1:30 July 20th, if we do have a hearing –

THE COURT: We'll do this first before we get to a motion for new trial. If there is, that would be plenty of time to deal with that, having the motion for new trial, if that's the way my ruling goes. You have 30 days, a couple of weeks for a motion, if that's the way it goes. There would be plenty of time for argument.

Anything further for Mr. Pena today?

MR. MEYRICK: No. Thank you.

(The proceedings this date were concluded.)

ORDER – Re: Defendant's Motion for Disclosure of Jury Information – III

Having received the affidavits of the two female jurors who contacted Kelly C. Cherry, Esq., in accordance with the Court's April 28 and April 30, 2010 Orders, the Court provides the following analysis of the "Defendant's Motion for Disclosure of Jury Information," including the responses from the prosecution and the rough draft of the 2/23/10 *voir dire* at trial:

A. Standard of Review – Juror Bias.

1. The actual deliberations that occur among the jurors are protected from inquiry under C.R.E. 606(b)." *Stewart v. Rice*, 47 P.3d at 322. However, the failure of a juror to disclose a bias so that a challenge for cause or a peremptory challenge may be exercised may permit additional inquiry post-verdict:

> The purpose of voir dire is to determine whether any potential juror has beliefs that would interfere with a party's right to receive a fair and impartial trial.
>
> If discovered during trial, a potential juror's failure to answer questions truthfully during voir dire may justify replacing the juror with an alternate or may require a mistrial. When mendacity is discovered only after the jury renders a verdict, a new trial may be warranted. However, untruthful answers on voir dire do not per se entitle a party to a new trial.
>
> When a juror deliberately misrepresents important information potentially relevant to

> a preemptory challenge or knowingly conceals a bias or hostility towards a party, that fact may necessitate a new trial because the juror's knowing misrepresentation or concealment alone shows that the juror is likely incapable of rendering a fair and impartial verdict. *People v. Dunoyair, supra.*
>
> If a juror's misrepresentation or nondisclosure was inadvertent, however, then the aggrieved party must show the nature of the misrepresented or undisclosed information "was such as to create an actual bias." Absent this showing, we presume the juror followed the instructions and based a decision on the evidence and the law.

Black v. Waterman, 82 P.3d 1130, 1136, 1137 (Colo. App. 2003)(citations omitted). "A defendant has the right to exercise all of his peremptory challenges, and when a juror misrepresents or conceals material and relevant matters, that right, as well as the right to challenge for cause, is impaired." *Allen v. Ramada Inn, Inc.*, 778 P.2d 291, 293 (Colo. App. 1989).

> "Where ... a juror deliberately misrepresents important biographical information relevant to a challenge for cause or a peremptory challenge or knowingly conceals a bias or hostility towards the defendant, a new trial might well be necessary.... In such instances the juror's deliberate misrepresentation or knowing concealment is itself evidence that the juror was likely incapable of rendering a fair and impartial verdict in the matter."

People v. Dunoyair, 660 P.2d 890, 895 (Colo. 1983)(citation omitted).

2. Finally, where the trial court denies a party's challenge for cause based on bias, and the denial is held to be improper, a new trial is warranted because the party's ability to impanel a jury through the full use of all peremptory challenges is impaired, regardless of the effect of any actual bias which may occur during jury deliberations [which are protected under C.R.E. 606(b)]. *People v. Harlan*, 8 P.3d 448, 460 (Colo. 2000); *People v. Kriho*, 996 P.2d 158, 168 (Colo. App. 1999).

3. As noted above, however, the actual effect of juror bias, as with other types of information which may inappropriately affect jury deliberations, is not relevant to the Court's analysis under C.R.E. 606(b).

> In reaching this conclusion, we consider only those allegations in the affidavit which relate directly to the nature of the information. We do not consider those allegations which concern what use the jurors may have made of the information or the jurors' deliberations and mental processes generally.

Kendrick v. Pippin, 222 P.3d 380, 387 (Colo. App. 2009)(emphasis added). Consequently, whether or not all jurors unanimously agreed on their "guilty" verdict does not affect the Court's analysis of whether a juror intentionally or inadvertently concealed a bias toward the defendant, and if so, whether that action warrants a new trial.

B. Factual Background.

4. The following scenario resulted in the jury's verdict against the defendant:

> a. On February 23, 2010, the jury venire filled out the written juror questionnaire which included, *inter alia*, the following question:

8. Friends or relatives in law enforcement? [Juror No. 11 answered, "Friends."]

17. Is there anything about you that you feel would make it difficult for you to be a fair juror in this case? __ If yes, please explain. [Juror No. 11 answered this question, "no."]

c. The jury venire was then sworn by the Court and voir dire began. During *voir dire*, the only individual question asked of Juror No. 11 was in response to a general question by the Court as to whether any of the jurors "had law classes of any kind?" Juror No. 11 stated "real estate and contract law," and assured the Judge that he could put that knowledge aside for the trial [Transcript at 21].

d. At one point, the Judge asked the venire, "Are you or any member of your family or any close acquaintance a law enforcement officer?" Although several other jurors disclosed friends and/or acquaintances who are (and who had been) law enforcement officers, Juror No. 11 did not disclose any current or previous law enforcement service [Transcript at 29-30]. Further, notwithstanding his answer on the questionnaire to Question No. 8, Juror No. 11 did not raise his hand regarding this question.

e. Defense counsel inquired of the entire venire whether "this is simply not a good case for them to be a fair juror." No jurors (including Juror No. 11) made any response.

5. Based on the information sworn to by two deliberating jurors, the following statements were allegedly made by Juror No. 11 during deliberations:

a. The juror stated that, "I think he did it because he's Mexican and Mexican men take whatever they want."

b. The juror also made other statements concerning Mexican men being physically controlling of women because they have a sense of entitlement and think they can "do whatever they want" with women.

c. The juror made statements that the defendant was guilty because, in his experience as an ex-law enforcement officer, Mexican men had a bravado that caused them to believe they could do whatever they wanted with women.

d. The juror stated that, where he used to patrol, nine times out of ten, Mexican men were guilty of being aggressive toward women and young girls.

e. The juror stated that he did not think the alibi witness was credible because, among other things, he was "an illegal."

C. 7/20/10 Status Conference.

6. Attached please find the rough draft of the *voir dire* examination by the Court and counsel on February 23, 2010.

7. The Court intends to discuss the facts set forth above in the context of the law presented at the Status Conference on Tuesday, July 20, 2010 at 1:30 p.m.

By Order of the Court this 19th day of July, 2010.

/s/ John L. Wheeler
JOHN L. WHEELER
District Court Judge

Cc: All parties

REPORTER'S TRANSCRIPT

APPEARANCES:

For the People: MINDY KRUSEY, ESQ.

For the Defendant: MICHAEL MEYRICK, ESQ.
KELLY CHERRY, ESQ.

THE DEFENDANT APPEARS IN PERSON ON BOND.

This matter comes on for hearing before the HONORABLE JOHN L. WHEELER, Judge of the District Court, on Tuesday, July 20, 2010.

This is a complete transcript of the proceedings had in the case at that time.

[2] PROCEEDINGS, TUESDAY, JULY 20, 2010

THE COURT: Calling 07CR2311, the People versus Miguel Pena-Rodriguez.

MS. KRUSEY: Mindy Krusey for the People.

MR. MEYRICK: Michael Meyrick and Kelly Cherry with the defendant, who appears.

THE COURT: We're at the point, I believe, where we need to make some decisions. I forwarded a rough draft of the *voir dire* to the jury, plus all the additional information that I have gleaned from the record.

The balance of it as follows: I'll just read from what I've written so far. And – well, actually, this was all sent to you. I apologize.

I've been working on this for so long I forgot whether I sent it or not, but I did.

This is all the information that I was able to find, either in written or spoken form during *voir dire*, whether it was in a questionnaire or from the oral questions that were asked and responses given by the Court and by counsel.

And in that information, a couple of things were apparent. One is that I do not believe that regarding the questions concerning fairness that either juror No. 11's answer to question 17, [3] "difficult for you to be a fair juror" to which he answered no; and the question that was asked later by defense counsel, if this is simply not a good case for them to be a fair juror, to which no one raised their hand, including juror No. 11, I don't think that is sufficient to hold juror No. 11 as misrepresenting, which is what the standard here is.

This has been very difficult to analyze. I've not had to analyze this issue before, and I found it extremely difficult to separate what was said in the jury room, which prompts this inquiry, from what we are allowed to consider once we start our determination of this issue, which cannot rely on anything that was said in the jury room. That may trigger an investigation. But based on what has been said cannot be the focus of the investigation because what happens in the jury room we cannot invade.

So the fact that juror No. 11 appears to be biased based on what he said in the jury room, unless he answered a question in *voir dire* or misrepresented or withheld information, that will not form the basis of a new trial on that issue. I do not feel that there is sufficient information here. I'm happy to take argument on that point. [4] But let me finish the argument.

The second issue here, whether or not this gentleman had prior law enforcement experience is a separate issue. Based on his – on the statements that he made in the jury room, it appears that he did have such experience. The question is whether or not any inquiry was made prior to that during *voir dire* which he might have misrepresented that fact.

The key issue being, as indicated in the case law, that both sides have a right to exercise their peremptories as they see fit and not in retrospect. Not saying might have or might not have, but the presumption is if there was a misrepresentation on a material issue, and that option was not presented, that can be grounds for a new trial.

The question that was asked – and I did not conduct this *voir dire* – but my question in my script being slightly different; and, in fact, the question in Judge Antrim's script, which we checked, is slightly different than the question she actually asked. The question in her script "or have you ever been," was not asked, the question being "Are you, or any member of your family or any close acquaintance a law enforcement officer?"

[5] Now, juror No. 11 – there were many jurors who answered the question. Juror 11 did not answer that question. There were many answers by other jurors in that *voir dire* about former law enforcement experience, people who had been, that they knew law enforcement officers.

And the question I have to answer is whether or not given not only the question that was asked, but the context of the question given all these other answers by other jurors, is whether that was sufficient to put juror No. 11 on notice that if, in fact, he had been a law enforcement officer in the past, indicating that he had

friends who were, in another question, is that enough? If it is enough, then we would have to decide what to do.

The only question that can be asked of juror No. 11, should he come in here, unless I change my mind on this issue of fairness, which I simply thought very long and very hard about that separate issue of fairness question, but is, why he did not answer when asked, "Are you or any member of your family or close acquaintance a law enforcement officer given the context of the other jurors answering questions about former friends – or former or friends who had formerly been law [6] enforcement officers. And he can say one of many things. He can say six-and-a-half months ago he has no clue; he doesn't remember; or, he remembers the question, didn't understand it; or he did understand it and took it literally that he was not presently a law enforcement officer, even though other people were answering questions about former law enforcement officers, and decided to keep that to himself.

So that's how I see this right now. And I'm willing to take – I've not made a decision because that's why I wanted to deal with this today. But is there any other way you want me to address this? Or any other things you want me to look at?

MS. KRUSEY: Well, Judge, I think respectfully with the question of the second part of your inquiry, law enforcement experience, I don't see how we can fault a potential juror for taking a question from the Court as Your Honor's *voir dire* is conducting it, at that point how we could fault the juror for taking her question at face value.

From the transcript, the question is phrased as present tense law enforcement. And so I think we

have – a lot of times when we're picking juries, certainly have – a lot of times I've seen myself [7] where jurors raise their hand and give information is not necessarily in response to the question being asked, it goes outside what we're asking, but compelled they should say something. I don't think that jurors doing that where essentially – and I haven't had the opportunity to review the transcript of the *voir dire* yet, Your Honor –

THE COURT: By the way, I sent it to you the minute I got it. It just so happened we had this hearing scheduled.

MS. KRUSEY: I understand. And I apologize that I wasn't able to. I was out of the office yesterday afternoon and in court this morning.

But I don't see how we can make it incumbent upon other potential jurors to answer a question not being asked of them just because other potential jurors feel compelled to add some additional information or make additional responses. I don't think that we can establish that he's misrepresenting anything when he had no reason to answer a direct question being asked of the venire. The direct question is whether it's prior – whether it's present law enforcement experience. And by the affidavits, he's not presently a law enforcement officer. It said clearly in the affidavits in his [8] past, an ex-border patrol, or something along those lines.

THE COURT: Also says in the questionnaire, friends or relatives in law enforcement. He answers yes, he essentially answers friends, he says, answering yes.

MS. KRUSEY: Yes.

THE COURT: Now, he still doesn't answer this question, "Are you or any member of your family or

any close acquaintance a law enforcement officer?" even though he acknowledges friends who are. And does not respond to that question. That also concerns me.

MS. KRUSEY: The question that's on the written juror questionnaire, No. 8, is just that segment, friends or relatives in law enforcement?

THE COURT: Unfortunately, it is the stock questionnaire. That's all it says. That's it.

MS. KRUSEY: Okay. Without having it in front of me and having more context to it –

THE COURT: I don't think the questions on either side – I have it right here.

I think the questions on either side are non sequitur, no logical order to these questions, as I recall, unfortunately. Section 8, No. 7, your level [9] of education, including any legal training. And No. 9, it is sort of a sequitur, "Have you or a family member ever had a good or bad experience with a police officer?" So there is some segue there from 8 to 9, but not 7 to 8. But no more than that.

Well, Mr. Meyrick, Ms. Cherry, what's your position?

And given I assume what your position will be, what do you want to do?

MR. MEYRICK: That's a good question.

THE COURT: Let's assume we know your position.

MR. MEYRICK: I think you probably know my position. But I'm not as convinced as the Court the fairness issue has been dealt with. I think that the fairness issue is not just limited to what I view as concealment of an important fact that could have led to further discussions, possibly a challenge for cause;

at a minimum, a peremptory challenge. But Judge Antrim went through the entire jury panel with people who were volunteering information about that. And despite the fact that he indicated he had friends in law enforcement, he didn't participate in that.

Now, in and of itself, I would agree that's not [10] enough. But in the context of all the other people who were disclosing issues, and at the very end of it, the Judge, at Page 38, says one more time to the entire panel, "Have I missed anyone?" And there's still no disclosure. And then she moves on to the presumption of innocence and says, you know, "The defendant is presumed innocent. Is there anybody who cannot accept that?" Is there – and then she offers – and she said, Now, you may not want to discuss this publicly. So I'm offering, the Judge talking, I'm paraphrasing – but what she says, I'm offering to talk to anybody privately about this issue if you have a problem with the presumption of innocence. And so I think that that does go to the fairness part of it. I mean, she gives the panel a second opportunity after she's been through each and every hand, and had discussions with a minimum of three jurors about former law enforcement officers and whether or not that can color their perception of the case, and whether or not they could still be fair based on all that, and still we have nothing from him.

So I think taken in context, that both the fairness issue with regard to the presumption of innocence, and the possible intentional concealment [11] of the fact that he himself was a former law enforcement officer, because then she says at the very end he has two opportunities, one from the Judge and one from me.

She says, "Now, is there anything we haven't discussed that you think that we should know?" And, again, there's silence.

And when I did my portion of the *voir dire*, that's the last question I ask of any jury panel, is there anything that we haven't talked about? Is there anything that you think we need to know about? Even if we haven't addressed this directly, is there anything else that you think we should know about, whether or not you are the best juror for this case?

So all of those things together I think do give some cause for us to pause about this fairness issue, as well as the concealing of the law enforcement officer/former law enforcement officer status.

THE COURT: Before you go on, on that fairness issue, as far as the catch-all, whether it's Judge Antrim doing it or you doing it, that gives people, in my opinion, an opportunity to volunteer information, but does it impose an obligation to say something that they should have said before? Or does that require a more specific question? The [12] case law on the fairness issue of bias seems to require more specific questions. There were no questions asked about the defendant's ethnicity, about anyone – it almost always happens for some reason in cases involving criminal cases, in my courtroom anyway, in the last three-and-a-half years involving African-American defendants, there will almost always be a question about that. One reason I think is because our jury panels are noticeably deficient in African-American jurors. Not so much on Mexican-Americans or jurors of Hispanic decent [sic]. But certainly there's a much larger population in Denver with a larger African-American decent [sic] base that comes into the courtroom.

So those questions are always asked. Why in this case was such a question not asked, don't know and don't care, whether it was intentional or not to ask such a question in *voir dire*. But, I think it takes more than that just to say "Can you be fair?" because I would fully intend, although this question would never be asked of juror No. 11 because we cannot invade jury deliberations. But if we were to ask, "Why did you say those things?" I'm absolutely certain what he would say was, Oh, that's my experience. I'm not trying to be unfair. That's [13] just my experience. Well, that may not carry a lot of credibility with anyone except for in his own mind, but he may very well have thought that he was being totally fair and answered the question honestly. If it had been asked of him, whether a question which cannot be asked, but still if we were asked that question, he would probably say no, I was totally fair. That's just my experience. Whereas, an objective party would say no, you're biased. If we were asked that question in *voir dire* about Mexican-Americans or people of Hispanic decent [sic], males, he may very well have said the same thing and been a strike for cause. But he wasn't asked that question; only, "Are you being fair?"

So that's why I draw a distinction between – let's say, hypothetically, the question had been asked correctly, "Are you or have you ever been," and he had said nothing, I see that as a quantum difference between that and the fairness issue. He had misrepresented for one reason or another, or by his silence misrepresented; whereas, fairness, it's too soft. It's just even if the question, "Do you have any biases," that would even be a better question than fairness. But I have great difficulty with that one of overturning a jury verdict based on [14] that. Whereas, the law enforcement issue, the only issue that we need to get

past there in order for then this to be totally in the Court's discretion, is whether or not, "Are you a law enforcement officer?" In the context that that question was asked and answered by others, should have given him understanding that he needs to raise his hand and say something. Then it becomes my decision, as indicated in the case law, that can be the basis. Will it be? That's my decision. But that undoubtedly can form the basis because the defense must have the opportunity of not saying gee, we would have drilled down and found all this out. But just the fact that he was a cop, do I want him on my jury? There were no other police officers on that jury.

So that's how I look at this. And, as I say, as far as what you want to do, if I were to rule that that question in its context is sufficient to have caused him to say something and should have said something, do you want to bring him in here? Hypothetically. If that's what I decide.

MR. MEYRICK: Yeah.

THE COURT: Because you bring him in, the question is very limited, very limited. There will [15] be no bias question.

MR. MEYRICK: Right. I understand.

THE COURT: And that's something I need to rule on and counsel needs to talk about it. If I do not rule that it is sufficient, then the issue is over and you go to another court. But if I rule that it is sufficient, then we have to decide what to do with this gentleman.

I have no great desire to talk to him. But, as I say, the answers – you can put them on your hand. Either he remembers it and he concealed it. I doubt he's going to say that. He might, but I doubt it. I don't remember

anything about this. It was too long ago. I would say there's a 50/50 chance he's going to say that; or, I didn't understand – or the third is, I didn't understand the question. Or, I answered it completely honestly. I'm not a police officer. So it's one of those four things. If that's all he's going to say, and depending on how each side wants to react to that if we bring him in, do we need to bring him in?

MR. MEYRICK: And I guess since the Court's the one that has to make the decision, if the Court feels that there's adequate information in the existing record to make a ruling either based on the [16] context and the questioning as a whole, or –

THE COURT: I think I have.

MR. MEYRICK: – or if the Court wants more information.

THE COURT: I have to give him an opportunity to explain. If we're going to overturn a jury verdict, I have to give him the opportunity to explain unless counsel feels it is immaterial whatever he would say.

MS. KRUSEY: Your Honor, my position would be – well, obviously my position is we don't go past anywhere today.

THE COURT: I haven't made that decision. I don't want to have another hearing on this.

MS. KRUSEY: I understand. As much as I don't want to, if we would go past today, as much as I don't want to have to go to a hearing or anything, I kind of feel we have to. If the Court is going to make a determination whether or not there was a material misrepresentation or concealment, I think he needs to be asked that question. We need to hear his answer. Otherwise, I don't know how the Court necessarily

can – if Your Honor feels that more information needs to be taken, can make that determination without more, if you do think there is [17] something there, something maybe hiding why he didn't respond when others were responding, I don't see how we get past that without him coming in and answering that question, because he's the only one that knows.

I think Your Honor is absolutely correct, there's about four possibilities. And obviously counsel and I will argue where the possibilities fall.

THE COURT: Let me make a decision then and – I'm just going to make it.

I believe that in the context of that question that was asked, it should have been clear enough to juror No. 11 that he should say something. If there was any – certainly it occurred to him – unless he simply didn't hear the question, didn't understand the question, it was a fairly straightforward question. But if he didn't hear it or some reason didn't understand it, I believe the thought should have run through his mind and a decision was made in his mind that he would not answer the question because he was not presently a law enforcement officer. And after – or several other people, at least two, if I'm not mistaken – three people talked about acquaintances who used to be law [18] enforcement officers, why that didn't trigger his saying something, that he was in exactly the same position. That if he heard and understood the question, that had to have gone through his mind. And he had to have made a decision that he would not say anything. And, to me, that means we've got to talk to him.

So we'll set up a time to do this. I think the appropriate way to do this is to have my clerk or bailiff contact

him rather than one party or the other, unless you disagree.

MR. MEYRICK: No. I think it would be inappropriate for either the prosecution or the defense to talk to him about this issue.

THE COURT: Then we'll bring him in. And I will, in the meantime, create a list of questions for him that I will ask him. I will let counsel follow up. But I'll give you those questions in advance. And if you want to make suggestions, that's fine. But I'll give you those in advance so we know exactly what we're going to do with him and what we're not going to do with him. And we'll do that as quickly as we can. I can't imagine in this sort of circumstance that I don't have subpoena power to do that. But I'll look or I'll research [19] it. I just doubt he'll have a problem with this. I'm obviously not going to tell him in advance what we're going to be doing. And as far as he's going to be aware, all this has to do with – unless somebody else has talked to him, I don't know – is going to have to do with whether or not he's a law enforcement officer.

Now, Mr. Meyrick, I will give you something more in writing strictly on the fairness issue. I think that deserves to be in writing if you wish to appeal it. If we bring him in –

MR. MEYRICK: It can wait, I think.

THE COURT: I thought long and hard about this. When we ask him if he comes in on the fairness issue, you can't go into *voir dire* again. All you can ask him, "Are you fair?" And what's he going to say? So you can't drill into it. So, again, as you say, perhaps it doesn't matter. And we'll wait on that one. But I will preserve your record with an order.

Okay. We're going to have to figure out a time with juror No. 11 first.

COURT CLERK: Because the defendant is on bond, we have to have a date certain for him to come back.

THE COURT: Why don't you look for a date. If [20] we can't do it on that date, we'll change it. We'll set a date.

THE COURT: August 12th.

MS. KRUSEY: Fine with the People.

MR. MEYRICK: Okay.

THE COURT: Will that work?

MR. MEYRICK: Yes.

THE COURT: If it's going to be different than that, I'll call, because we'll have to get ahold of juror No. 11.

MS. KRUSEY: And just to let the Court know, my last day with the office is actually this Friday. So Jacob Edson, who originally had this case and I covered it for him, he will be taking this back from me. So I have his calendar with me. I brought it, and it's fine with his calendar. But for any future communications, it will be with Mr. Edson. I wanted to make the Court aware. And I let Mr. Meyrick know as well.

THE COURT: Okay.

All right. I'll get this out as quickly as I can on this fairness thing. But we will contact juror No. 11 and make every effort to do it on that date and time. And if it's going to be any different, if he's not in town or something like [21] that, we'll notify you and schedule another time.

MS. KRUSEY: Okay.

THE COURT: Bond is continued until that date.

Thank you.

MR. MEYRICK: Thank you, Your Honor.

(The proceedings this date were concluded.)

* * * *

Memo to File:

Date: July 25, 2010

To: File

From: John Wheeler

Re: 07CR2311 – Pena-Rodriguez

1. During jury selection on this case (*P. v. Miguel Angel Pena-Rodriguez*), you filled out a written Juror Questionnaire before coming up to the courtroom for the *voir dire* procedure. [Give Mr. C a copy of his Juror Questionnaire.]

2. Among other answers, you answered one particular question in the following manner:

8. Friends or relatives in law enforcement? Friends

3. After the jury panel came up to the courtroom, the entire jury panel was then sworn by the Court and *voir dire* began. During *voir dire*, you raised you hand to answer a general question by the Court as to whether any of the jurors "had law classes of any kind?" You answered that you had "real estate and contract law" classed, and assured the Judge that he could put that knowledge aside for the trial.

4. At one point, the Judge asked the venire, "Are you or any member of your family or any close acquaintance a law enforcement officer?" Although you had indicated on your questionnaire that you did have "friends" who were in law enforcement, you did not raise your hand or respond to that question. Why did you not respond at that time?

5. Other jurors also responded that they had friends who formerly were in law enforcement. Why did you not inform the Court that you had formerly been a law enforcement officer?

- **Do you recall the question?**
- **Did you understand the question?**
- **Did you make a decision not to inform the Court about your prior law enforcement service?**

REPORTER'S TRANSCRIPT

APPEARANCES:

For the People: JACOB EDSON, ESQ.

For the Defendant: MICHAEL MEYRICK, ESQ.

KELLY CHERRY, ESQ.

THE DEFENDANT APPEARS IN PERSON ON BOND.

This matter comes on for post-trial hearing before the HONORABLE JOHN L. WHEELER, Judge of the District Court, on Thursday, August 12, 2010.

This is a complete transcript of the proceedings had in the case at that time.

[2] PROCEEDINGS, THURSDAY, AUGUST 12, 2010

THE COURT: 07CR2311, the People versus Miguel Pena-Rodriguez.

MR. EDSON: Jacob Edson for the People.

MR. MEYRICK: Michael Meyrick and Kelly Cherry with the defendant, Mr. Pena-Rodriguez, who appears on bond.

THE COURT: All right. We have Mr. [C] waiting in the wings out there. And my proposal is this: I've given counsel an outline of my questions for Mr. [C]. And based on my research, it's quite clear to me that the only issue that I will address, and that counsel may address after I finish, is the issue of whether or not the issue of his disclosures, both on the jury questionnaire and in direct response to the Judge's questions – Judge Antrim being the only person who asked questions about these particular issues of his disclosure

concerning – or failure to disclose that he had previously been in law enforcement.

What is also clear in my research was, No. 1, no issue that was directly addressed by the other jurors concerning Mr. [C]'s alleged bias can be addressed here. That information was only raised in deliberations and cannot be the subject of any [3] inquiry here. An ancillary issue that might lead to those questions about bias or reveal information about that also can't be asked, and that is drilling down into the issue of his prior law enforcement career.

The only issue is why he didn't disclose it, not – this is not further *voir dire*. This is not the time to be asking questions, Well, what were your experiences when you were a former law enforcement officer? That gets to the issue of bias, which was addressed or raised only in deliberations, so it cannot be a subject of our conversations.

The only issue being why he didn't disclose it. And I tried to think of every question I could ask him, and every issue that might have been addressed either in the questionnaire or in direct questions to him. And the only ones that I found – after I went through this several times as far as going through the transcript - were this issue of the disclosure of friends and Judge Antrim's question about whether, quote, Are you or any member of your family or close acquaintance a law enforcement officer? That being a present tense question. And I actually ran this by Judge Antrim, and her [4] scripted question is not this question. Her scripted question is past or present, but that's not the question she actually asked, and that surprised her. But it is not the question she actually asked. So that's why I've phrased this in the way that I did.

I also went through and checked that other people in the panel talked about friends who had formerly been in law enforcement, even though they were not asked that question, and why that didn't trigger something. So that's why the questions are phrased in the way that they are.

So is there any question about that?

MR. MEYRICK: Yes, Your Honor. With respect to the Court's outline No. 3, where the juror was asked whether or not they had any kind of classes, if, in fact, he was a police officer, and you're prohibiting us from asking about his experiences there, if he went to the police academy and had criminal law, arrest, search and seizure law, and things of that nature. That, too, I would think, based on the fact that he's already been advised this is a critical case and he doesn't say anything about having criminal law classes, he limits his response to contract and real estate law, I think [5] that's relevant if, in fact, he was a police officer; if, in fact, he went to the academy, and so on and so forth, because that may indicate to the Court – or the Court could take some sort of inference from that that perhaps he didn't disclose something that would have been relevant at that point in time, and that that goes more to whether or not it was deliberate or –

THE COURT: I would be amenable to asking a question under No. 3, did he have any criminal law classes.

MR. MEYRICK: Okay.

THE COURT: Period.

MR. MEYRICK: That's fine.

THE COURT: Given the disclosure that he had other law classes.

MR. MEYRICK: And the only other thing I would say, we have been through this, the Court's ruled. I want to make the record clear that I do think that the remainder is relevant. I think it goes to demonstrate actual bias in the event that there's a finding that the disclosure was inadvertent, and that's my position on that.

THE COURT: I understand the position, but –

MR. MEYRICK: Thank you.

[6] THE COURT: – but I have made my ruling on that, and we will not go into it. It is preserved for appeal.

MR. MEYRICK: Thank you.

THE COURT: Mr. Edson.

MR. EDSON: Nothing additional, Judge.

THE COURT: All right.

And I'm going to swear him in. My guess, we will have to reset this for any other type of argument you want to make, simply because we are in the middle of a jury trial. We have to get this case to the jury. So I apologize for that. I wanted to get this at least out of the way so Mr. [C] does not need to be involved in this anymore.

(Mr. [C] present in the courtroom.)

THE COURT: Thank you, Mr. [C]. I know that you're not terribly pleased about being here.

Let me explain the circumstance. We need to ask you a few questions. I'm going to swear you in in order to answer those questions. And this concerns your being selected as a juror in this case, back whenever this was. Let me do that first.

[7] [H.C.], having been first duly sworn by the Court, testified as follows:

EXAMINATION

BY THE COURT:

Q. In your juror questionnaire – that's the original copy.

As you recall, this was case 07CR2311, the People versus Mr. Pena-Rodriguez.

During jury selection on this case, you filled out a written juror questionnaire before coming up to the courtroom for the *voir dire* or jury selection procedure.

Among other answers, you answered one particular question in the following manner: Question No. 8. It says simply, "Friends or relatives in law enforcement?" You put down, "Friends."

Also, after you came up to the courtroom, the entire jury panel was sworn by Judge Antrim in the next courtroom over, and the *voir dire* began.

During *voir dire*, you raised your hand to answer a general question asked by the Court as to whether any jurors – and the question was, "Have law classes of any kind?" You answered that you had real estate and contract law classes.

A. Correct.

[8] Q. And assured the Judge that you could put that knowledge aside for the trial. Do you recall that?

A. I do.

Q. Did you have, during your experience, any criminal law classes?

A. Not that I can think of. Real estate does not deal with criminal.

Q. All right. At one point, the Judge asked the entire panel, Are you or any member of your family or any close acquaintance a law enforcement officer?

Although you had indicated on your questionnaire that you did have friends who were in law enforcement, you did not raise your hand or respond to that question. Why did you not respond?

A. The only thing I can think of, my son's nephew by marriage is the only one I still know that's in law enforcement. He's an El Paso County deputy sheriff, so I have maybe contact with him once a year at family get – togethers.

Q. Other jurors also responded they had friends who were formerly in law enforcement. Why did you not inform the Court at that time that you had formerly been a law enforcement officer?

A. It was forty years ago. I don't recall it was a question about employment.

[9] Q. Do you recall the question?

A. No, I don't.

Q. You don't have any recollection of it at all?

A. Not that I can say specifically.

Q. Do you recall a general question that the Judge asked about, Are you or a member or any family or close acquaintance a law enforcement officer?

A. Off the top of my head, no, I can't specifically say.

Q. Did you make any decision not to inform the Court about your prior law enforcement service?

A. No. It was never pointedly asked me if I had been employed.

Q. When you say "not pointedly asked," the question was – taking out some of the language about friends or family – "are you a law enforcement officer?"

A. It was forty years ago, in the late '60s.

Q. Is that how you understood the question at the time?

A. It was friends or relatives currently. That's the way I had a recollection.

THE COURT: Mr. Edson?

MR. EDSON: Nothing additional.

THE COURT: Mr. Meyrick?

MR. MEYRICK: If could I have just a moment, [10] Your Honor.

THE COURT: Yes, you may.

MR. MEYRICK: If we could approach for a moment?

THE COURT: Yes, you may.

Mr. [C], I'll ask you to step out for a minute. We will get you right back.

(Mr. [C] left the courtroom.)

MR. MEYRICK: Your Honor, I don't want to go outside the Court's parameters here. That's why I didn't ask the question.

Do you think it would be prudent now to ask him, now that he said that he was a law enforcement officer, if he attended any academy law classes?

THE COURT: I can certainly ask him that again, now that he knows where we are going. I'll ask him that question.

MR. MEYRICK: Okay. That was where I was going about whether or not there was further nondisclosure about law classes.

THE COURT: Now I understand.

(Mr. [C] present in the courtroom.)

THE COURT: Thank you, sir.

It was kind of silly to have you in here when we were talking about a question we may or may not [11] ask. I am going to ask the question, though.

Now that I have indicated to you what the issue here is, and that is your prior law enforcement employment, I'm going to re-ask you the question. Perhaps this will jog your memory.

Do you recall having, in that experience of law enforcement employment, criminal law classes or criminal –

THE WITNESS: No.

THE COURT: Mr. Meyrick, anything further?

MR. MEYRICK: No, Your Honor.

THE COURT: Okay.

Thank you, Mr. [C], very much. You are released and we very much appreciate your coming in. (Mr. [C] left the courtroom.)

THE COURT: Okay. I think what is the appropriate way to handle this is if – Mr. Meyrick, if you and Ms. Cherry wish to supplement what you've already presented, I think that would be appropriate to do so

in writing. If you wish to schedule it for a hearing, we will do that. If you wish to address it in writing – but the People need something to respond to.

MR. MEYRICK: Right.

THE COURT: I think that's the way –

[12] MR. MEYRICK: I'll write it.

THE COURT: Okay. What sort of time frame do you want to work with?

MR. MEYRICK: The next two weeks are very busy for me. Anything beyond that is fine.

THE COURT: Three weeks?

MR. MEYRICK: Friday, the 3rd? Thank you.

THE COURT: Thank you.

(The proceedings were concluded.)

ORDER – Re: Defendant's Motion for New Trial – Final Order

Having received the affidavits of the two female jurors who contacted Kelly C. Cherry, Esq., in accordance with the Court's April 28 and April 30, 2010 Orders, and having conducted a hearing with the subject juror on August 12, 2010, pursuant to the Court's Order at hearing on July 20, 2010, and having received "Defendant's Brief in Support of His Motion for New Trial," including the People's response, and otherwise being fully advised of the premise of the Motion, the Court issues the following ruling:

A. Factual Background.

1. The following scenario resulted in the jury's verdict against the defendant:

a. On February 23, 2010, the jury venire filled out the written juror questionnaire which included, *inter alia*, the following question:

> 8. Friends or relatives in law enforcement? [Juror No. 11 answered, "Friends."]
>
> 17. Is there anything about you that you feel would make it difficult for you to be a fair juror in this case? ___If yes, please explain. [Juror No. 11 answered this question, "no."]

c. The jury venire was then sworn by the Court and *voir dire* began. During *voir dire*, the only individual question asked of Juror No. 11 was in response to a general question by the Court as to whether any of the jurors "had law classes of any kind?" Juror No. 11 stated "real estate and contract law," and assured the Judge that he could put that knowledge aside for the trial [Transcript at 21].

d. At the beginning of *voir dire*, the Judge inquired of the entire venire: "Do any of you have any feeling for or against the defendant or the Prosecution?" The Judge confirmed that no potential jurors raised their hands (including Juror No. 11).

e. At one point, the Judge asked the venire, "Are you or any member of your family or any close acquaintance a law enforcement officer?" Although several other jurors disclosed friends and/or acquaintances who are (and who had been) law enforcement officers, Juror No. 11 did not disclose any current or previous law enforcement service [Transcript at 29-30]. Further, notwithstanding his answer on the questionnaire to Question No. 8, Juror No. 11 did not raise his hand regarding this question.

f. Defense counsel inquired of the entire venire whether "this is simply not a good case for them to be a fair juror." No jurors (including Juror No. 11) made any response.

2. Based on the information sworn to by two deliberating jurors, the following statements were allegedly made by Juror No. 11 during deliberations:

a. The juror stated that, "I think he did it because he's Mexican and Mexican men take whatever they want."

b. The juror also made other statements concerning Mexican men being physically controlling of women because they have a sense of entitlement and think they can "do whatever they want" with women.

c. The juror made statements that the defendant was guilty because, in his experience as an ex-law enforcement officer, Mexican men had a bravado that

caused them to believe they could do whatever they wanted with women.

d. The juror stated that, where he used to patrol, nine times out of ten, Mexican men were guilty of being aggressive toward women and young girls.

e. The juror stated that he did not think the alibi witness was credible because, among other things, he was "an illegal."

3. On August 12, 2010, Juror No. 11 was sworn and testified as follows to questions asked by the Court (which had been presented to the parties in writing by the Court prior to the hearing). The following colloquy occurred between the Court and Juror No. 11:

BY THE COURT:

Q. In your juror questionnaire – that's the original copy. As you recall, this was case 07CR2311, the People versus Mr. Pena-Rodriguez. During jury selection on this case, you filled out a written juror questionnaire before coming up to the courtroom for the *voir dire* or jury selection procedure. Among other answers, you answered one particular question in the following manner: Question No. 8. It says simply, "Friends or relatives in law enforcement?" You put down, "Friends." Also, after you came up to the courtroom, the entire jury panel was sworn by Judge Antrim in the next courtroom over, and the *voir dire* began. During *voir dire*, you raised your hand to answer a general question asked by the Court as to whether any jurors – and the question was, "Have law classes of any kind?" You answered that you had real estate and contract law classes.

A. Correct.

Q. And assured the Judge that you could put that knowledge aside for the trial. Do you recall that?

A. I do.

Q. Did you have, during your experience, any criminal law classes? A. Not that I can think of. Real estate does not deal with criminal.

Q. All right. At one point, the Judge asked the entire panel, Are you or any member of your family or any close acquaintance a law enforcement officer? Although you had indicated on your questionnaire that you did have friends who were in law enforcement, you did not raise your hand or respond to that question. Why did you not respond?

A. The only thing I can think of, my son's nephew by marriage is the only one I still know that's in law enforcement. He's an El Paso County deputy sheriff, so I have maybe contact with him once a year at family get-togethers.

Q. Other jurors also responded they had friends who were formerly in law enforcement. Why did you not inform the Court at that time that you had formerly been a law enforcement officer?

A. It was forty years ago. I don't recall it was a question about employment.

Q. Do you recall the question?

A. No, I don't.

Q. You don't have any recollection of it at all?

A. Not that I can say specifically.

Q. Do you recall a general question that the Judge asked about, Are you or a member or any family or close acquaintance a law enforcement officer?

A. Off the top of my head, no, I can't specifically say.

Q. Did you make any decision not to inform the Court about your prior law enforcement service?

A. No. It was never pointedly asked me if I had been employed.

Q. When you say "not pointedly asked," the question was – taking out some of the language about friends or family – "are you a law enforcement officer?"

A. It was forty years ago, in the late '60s.

Q. Is that how you understood the question at the time?

A. It was friends or relatives currently. That's the way I had a recollection.

B. Standard of Review – Juror Bias.

4. The actual deliberations that occur among the jurors are protected from inquiry under C.R.E. 606(b)." *Stewart v. Rice*, 47 P.3d at 322. However, the failure of a juror to disclose a bias so that a challenge for cause or a peremptory challenge may be exercised may permit additional inquiry post-verdict:

> The purpose of voir dire is to determine whether any potential juror has beliefs that would interfere with a party's right to receive a fair and impartial trial.
>
> If discovered during trial, a potential juror's failure to answer questions truthfully during voir dire may justify replacing the juror with an alternate or may require a mistrial. When mendacity is discovered only after the jury

> renders a verdict, a new trial may be warranted. However, untruthful answers on voir dire do not per se entitle a party to a new trial.
>
> When a juror deliberately misrepresents important information potentially relevant to a preemptory challenge or knowingly conceals a bias or hostility towards a party, that fact may necessitate a new trial because the juror's knowing misrepresentation or concealment alone shows that the juror is likely incapable of rendering a fair and impartial verdict. *People v. Dunoyair, supra*.
>
> If a juror's misrepresentation or nondisclosure was inadvertent, however, then the aggrieved party must show the nature of the misrepresented or undisclosed information "was such as to create an actual bias." Absent this showing, we presume the juror followed the instructions and based a decision on the evidence and the law.

Black v. Waterman, 83 P.3d 1130, 1136-1137 (Colo. App. 2003)(citations omitted).

> The jury selection process cannot uncover every possible influence that might theoretically affect a juror's consideration of a case. One of the purposes of written instructions of law is to offset possibly inappropriate considerations that might arise during the course of a trial by emphasizing the importance of fairness in the deliberative process.

People v. Dunoyair, 660 P.2d 890, 895 (Colo. 1983).

"A defendant has the right to exercise all of his peremptory challenges, and when a juror misrepresents or conceals material and relevant matters, that right, as well as the right to challenge for cause, is impaired." *Allen v. Ramada Inn, Inc.*, 778 P.2d 291, 293 (Colo. App. 1989).

> "Where ... a juror deliberately misrepresents important biographical information relevant to a challenge for cause or a peremptory challenge or knowingly conceals a bias or hostility towards the defendant, a new trial might well be necessary.... In such instances the juror's deliberate misrepresentation or knowing concealment is itself evidence that the juror was likely incapable of rendering a fair and impartial verdict in the matter."

People v. Dunoyair, 660 P.2d at 895 (citation omitted).

5. Finally, where the trial court denies a party's challenge for cause based on bias, and the denial is held to be improper, a new trial is warranted because the party's ability to impanel a jury through the full use of all peremptory challenges is impaired, regardless of the effect of any actual bias which may occur during jury deliberations [which are protected under C.R.E. 606(b)]. *People v. Harlan*, 8 P.3d 448, 460 (Colo. 2000); *People v. Kriho*, 996 P.2d 158, 168 (Colo. App. 1999).

6. As noted above, however, the actual effect of juror bias, as with other types of information which may inappropriately affect jury deliberations, is not relevant to the Court's analysis under C.R.E. 606(b).

> In reaching this conclusion, we consider only those allegations in the affidavit which relate directly to the nature of the information.

> We do not consider those allegations which concern what use the jurors may have made of the information or the jurors' deliberations and mental processes generally.

Kendrick v. Pippin, 222 P.3d 380, 387 (Colo. App. 2009)(emphasis added). Consequently, whether or not all jurors unanimously agreed on their "guilty" verdict does not affect the Court's analysis of whether a juror intentionally or inadvertently concealed a bias toward the defendant, and if so, whether that action warrants a new trial.

C. Legal Analysis.

(1) Nondisclosure of biographical information.

7. Based on the answers provided by Juror No. 11 at the August 12, 2010, hearing and the written and oral responses by Juror No. 11 during *voir dire* on February 23, 2010, the Court has no factual basis to find that Juror No. 11 deliberately misrepresented or intentionally failed to disclose important information potentially relevant to a challenge for cause or a peremptory challenge regarding his prior law enforcement experience. *Black v. Waterman*, 83 P.3d at 1136.

a. Despite having law enforcement experience forty years prior, Juror No. 11 indicated that he had not had any criminal law classes or training.

b. Juror No. 11 had no specific recollection of the judge's question about being a law enforcement officer. As a general recollection, he did not recall that the question was inquiring about his employment status, and since he had not been a law enforcement officer for forty years, he did not understand that the question was asking for that employment information.

8. On the other hand, the Court does find that Judge Antrim's question as to whether any prospective juror was a law enforcement officer was clear enough (especially in the context of the answers provided by other jurors) to elicit a response from Juror No. 11 regarding his prior law enforcement experience, even though that experience was forty years earlier.

9. Therefore, the Court concludes that Juror No. 11 did fail to disclose his prior law enforcement experience, but that the disclosure was inadvertent due to his confusion regarding the nature of the question and the length of time since he had been a law enforcement officer.

10. Under the standard set forth in *Black v. Waterman and Dunoyair, supra*, the defendant "must show the nature of the misrepresented or undisclosed information "was such as to create an actual bias." *Black v. Waterman*, 83 P.3d at 1137.

11. As noted above, under C.R.E. 606(b), the *effect* of Juror No. 11's alleged bias during jury deliberations which apparently occurred in this case (i.e., Juror No. 11's reported statements about Mexican men and illegal aliens) is protected from consideration by the Court regarding the determination of whether actual bias resulted from the specific information inadvertently withheld by Juror No. 11. *People v. Harlan*, 8 P.3d at 460. However, in order to determine whether the bias alleged by the defendant is a component of the law enforcement experience which was inadvertently concealed during *voir dire*, the Court must consider the nature of Juror No. 11's offending conduct during deliberations. Upon examination, the alleged bias at issue during deliberations concerns negative impressions of Mexican men and illegal aliens.

12. On its face, Juror No. 11's law enforcement experience forty years earlier is not sufficient proof, standing alone, to create an actual bias by Juror No. 11 against the defendant regarding Mexican men and/or illegal aliens. Police officers are no more likely to have a bias against Mexican men and/or illegal aliens than any other demographic. The only way in which a relationship between Juror No. 11's former law enforcement experience and a bias against Mexican men and/or illegal aliens could have been established is through other questions during *voir dire* regarding such a bias.

13. Neither counsel nor Judge Antrim inquired directly and specifically about whether any juror had a bias against Mexican men or against illegal aliens. The Court will not speculate as to whether, if Juror No. 11 had revealed his law enforcement background, a logical follow-up question would have addressed any potential bias against Mexican men and/or illegal aliens. Such a question is more likely to have been asked of all prospective jurors, and not just of a juror who revealed past law enforcement experience. As noted, no such questions were asked of the venire.

14. Juror No. 11 (and all other prospective jurors) was asked the question in the written Juror Questionnaire, "Is there anything about you that you feel would make it difficult for you to be a fair juror in this case?", and Juror No. 11 answered "no." Further, the Court instructed the jury prior to deliberations that "[n]either sympathy nor prejudice should influence your decision." [Jury Instruction No. 1]. In the absence of proof of the creation of actual bias through the inadvertent failure to disclose, the Court must presume that the jury followed its instructions. *Dunoyair*, 660 P.2d at 896.

15. Although the Court regrets that Juror No. 11 was reported to have made statements during jury deliberations which raise the issue of his bias against Mexican men and/or illegal aliens, the fact of those statements during deliberations cannot weigh in the determination of whether Juror No. 11 failed to disclose this alleged bias during voir dire. *People v. Harlan*, 8 P.3d at 460. The Court has no proof that Juror No. 11's inadvertent failure to disclose his prior law enforcement experience translates into a bias against Mexican men and/or illegal aliens.

16. Based on this legal and factual analysis, the Court DENIES the defendant's Motion for a new trial.

By Order of the Court this 30th day of September, 2010.

/s/ John L. Wheeler
JOHN L. WHEELER
District Court Judge

Cc: All parties

No. 15-606

IN THE

Supreme Court of the United States

MIGUEL ANGEL PEÑA RODRIGUEZ,

Petitioner,

v.

STATE OF COLORADO,

Respondent.

On a Writ of Certiorari
to the Colorado Supreme Court

BRIEF FOR PETITIONER

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QUESTION PRESENTED

Most states and the federal government have a rule of evidence generally prohibiting the introduction of juror testimony regarding statements made during deliberations when offered to challenge the jury's verdict. Known colloquially as "no impeachment" rules, they are typically codified as Rule 606(b); in some states, they are a matter of common law.

The question presented is whether a no-impeachment rule constitutionally may bar evidence of racial bias offered to prove a violation of the Sixth Amendment right to an impartial jury.

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Tanner v. United States,
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Turner v. Louisiana,
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United States v. Benally,
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Vaise v. Deleval,
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Warger v. Shauers,
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Washington v. Texas,
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Williams v. Pennsylvania,
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Wiser v. People,
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Constitutional Provisions

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U.S. Const. amend. XIV 1, 18

Statutes

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Rules and Regulations

Fed. R. Crim. Proc. 6(e)(2) 35
Fed. R. Evid. 606 3
Fed. R. Evid. 606(b) ..... *passim*
Cal. Evid. Code § 1150 3
Colo. R. Evid. 606(b) 28
Colo. R. Prof'l Conduct 3.5(c)(3) 37
D. Md. Adm. R. 107(16) 37
E.D. Mo. L.R. 47-7.01 38

Other Authorities

76 Am. Jur. Trials 127 (2000) 25
Donner, Ted A. & Richard K. Gabriel, Jury Selection Strategy and Science (3d ed. 2015) 25
Gobert, James J. et al., Jury Selection: The Law, Art and Science of Selecting a Jury (3d ed. 2015) 27

Hollander, Nancy & Barbara E. Bergman, Everytrial Criminal Defense Resource Book (2015) 36

Kassin, Saul M. & Lawrence S. Wrightsman, The American Jury on Trial: Psychological Perspectives (1988).....24

Lubet, Steven, Modern Trial Advocacy: Analysis & Practice (4th ed. 2009) 26

Manso, Peter, *An Unjust Conclusion*, Boston Magazine (Mar. 2007) 35

Mauet, Thomas A., Trial Techniques (8th ed. 2010).....26

McCormick on Evidence (7th ed. 2013) 30

Model Criminal Jury Instructions Comm., Colo. Supreme Court, *Colorado Jury Instructions Criminal 2015* (2015) 36, 37, 38

Rothstein, Mark A., et al., Employment Law (5th ed. 2014).....41

Wigmore on Evidence (3d ed. 1940).....30

Wright & Gold, Federal Practice and Procedure (2d ed. 2007).....3, 18, 28, 31, 32

BRIEF FOR PETITIONER

Petitioner Miguel Angel Peña Rodriguez respectfully requests that this Court reverse the judgment of the Colorado Supreme Court.

OPINIONS BELOW

The opinion of the Colorado Supreme Court (Pet. App. 1a) is designated for publication at 350 P.3d 287 The opinion of the Colorado Court of Appeals (Pet. App. 28a) is published at 2012 COA 193. The relevant orders of the trial court (J.A. 125, 150) are unpublished.

JURISDICTION

The judgment of the Colorado Supreme Court was entered on May 18, 2015. Pet. App. 1a. On September 10, 2015, Justice Sotomayor granted an extension of time within which to file a petition for a writ of certiorari to and including November 12, 2015. *See* No. 15A265. Petitioner filed a petition for a writ of certiorari on November 10, 2015, which this Court granted on April 4, 2016. This Court has jurisdiction under 28 U.S.C. § 1257(a).

RELEVANT CONSTITUTIONAL PROVISIONS

The Sixth Amendment to the United States Constitution provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right to a . trial, by an impartial jury."

The Fourteenth Amendment to the United States Constitution provides in relevant part: "[N]or shall any state deprive any person of life, liberty, or property without due process of law."

INTRODUCTION

Our Constitution, as well as this Court's jurisprudence, reflects a steadfast commitment to expunging the "invocation of race stereotypes" from the administration of justice. *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 630 (1991). This commitment applies with special force to juries in criminal cases. A jury holds a person's liberty in its hands and must base its verdict solely upon "the evidence developed at trial." *Turner v. Louisiana*, 379 U.S. 466, 472 (1965) (internal quotation marks omitted). The interjection of "racial animus" into deliberations, therefore, destroys the "fundamental integrity of all that is embraced in the constitutional concept of trial by jury." *Id.*; *see also Georgia v. McCollum*, 505 U.S. 42, 58 (1992). As the State has put it: "[R]acial bias is reprehensible and should never be the basis for a verdict." BIO 17.

Meanwhile, the common law delivered to this Nation a tradition of protecting the secrecy of jury deliberations. In an oft-referenced 1785 English case where a jury allegedly reached its verdict by lot, Lord Mansfield refused to allow juror testimony to prove that malfeasance, pronouncing that jurors may not impeach their own verdicts. *Vaise v. Deleval*, 99 Eng. Rep. 944 (K.B. 1785). The common law's concern was that allowing juror testimony for that purpose would lead to juror harassment and "make what was intended to be a private deliberation, the constant subject of public investigation." *McDonald v. Pless*, 238 U.S. 264, 267-68 (1915).

But it is critical to recognize that "[t]he familiar rubric that a juror may not impeach his own verdict, dating from Lord Mansfield's time, is a gross

oversimplification." Advisory Comm. Notes to Fed. R. Evid. 606. This Court's first opinion concerning whether jurors may impeach their verdict stressed that "[i]t would perhaps hardly be safe to lay down any general rule upon this subject. Unquestionably such evidence ought always to be received with great caution. But cases might arise in which it would be impossible to refuse [juror affidavits] without violating the plainest principles of justice." *United States v. Reid*, 53 U.S. (12 How.) 361, 366 (1851); *see also McDonald*, 238 U.S. at 268-69 (same).

In light of these considerations, American law has always recognized circumstances in which courts can receive juror testimony describing statements made during deliberations. Over one hundred years ago, for instance, this Court held that jurors can testify about statements recounting extraneous information that were made during deliberations. *Mattox v. United States*, 146 U.S. 140, 148-49 (1892). Similar state common-law decisions abound. *See id.* at 149 (surveying state cases). Some states today – as well as the Model Code and Uniform Rules of Evidence – go so far as to allow juror testimony regarding "any . . . statements made" in the jury room. Cal. Evid. Code § 1150; *see also* 27 Wright & Gold, Federal Practice and Procedure § 6074 n.58 (2d ed. 2007).

The federal rule on the subject – Fed. R. Evid. 606(b) – and many state rules are more restrictive. They generally allow consideration of juror testimony regarding statements made during deliberations only in specified circumstances. But even among jurisdictions that follow Rule 606(b), the vast majority of courts to have considered the issue hold

that the Sixth Amendment's guarantee of an impartial jury requires courts to consider juror testimony offered to prove that racial bias infected jury deliberations. *See infra* at 30-32.

In this case, a bare majority of the Colorado Supreme Court held otherwise. It thus condoned a trial court's invocation of Rule 606(b) as a basis for refusing to consider evidence that a juror urged others during deliberations to find petitioner guilty "because he's Mexican and Mexican men take whatever they want." Pet. App. 4a (internal quotation marks omitted).

The question presented is whether the Constitution tolerates such a bar against evidence offered to prove a defendant was convicted of a crime on the basis of racial bias. Racially biased decision-making is uniquely deplorable and constitutionally inexcusable. And the jury system has already demonstrated that narrow exceptions to general no-impeachment rules – including one for racial bias – do not undermine any valid state interest. This Court should therefore hold that the Sixth Amendment demands that a defendant in petitioner's position have an opportunity to introduce the offending juror's comments at an evidentiary hearing to prove a deprivation of the right to an impartial jury.

STATEMENT OF THE CASE

1. In May 2007, a man entered a bathroom at a horse-racing track in Colorado and asked the teenage sisters inside if they wanted to drink beer or "party." After they said no, the man turned off the lights, leaving the room dark. As the girls went to leave, the man grabbed one girl's shoulder and began moving his hand toward her breast before she swiped him

away. The man also grabbed the other girl's shoulder and buttocks.

The sisters exited the bathroom and reported the incident to their father, a worker at the racetrack. They told him they thought the assailant was a racetrack employee who worked in the nearby horse barn. From that description, their father surmised they were referring to petitioner Miguel Angel Peña Rodriguez. Their father then reported the incident to on-site security personnel, who contacted the police.

Late that night, the police pulled petitioner over near the race track. The officers conducted a show-up with petitioner standing on the side of the road and each girl about fifteen feet away, looking through the window of a police cruiser. Both girls identified petitioner as the man who had assaulted them.

2. a. The State charged petitioner with four offenses relating to the incident: one felony count of attempted sexual assault on a victim younger than fifteen; one misdemeanor count of unlawful sexual contact; and two misdemeanor counts of harassment. Pet. App. 3a.[1] Petitioner maintained he had been misidentified and demanded a trial.

At voir dire, the trial court and the parties repeatedly asked potential jurors whether they could be "a fair juror" in this case or would "have a feeling for or against" petitioner. Pet. App. 3a; *see also* J.A. 34. The judge also asked if "there is any reason why [any potential juror] would not be able and willing to

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[1] The State also initially charged petitioner with driving under the influence, J.A. 15, but it dismissed that charge before trial.

render a verdict solely on the evidence presented at trial and the law I give you." J.A. 22. None of the impaneled jurors indicated in response to any of these questions that he or she harbored any racial bias. Pet. App. 3a.

During the short trial, the prosecution presented no physical or forensic evidence, such as a fingerprint from the bathroom light switch. Instead, the prosecution focused on the victims' pretrial and in-court identifications of petitioner. Defense counsel highlighted the short amount of time during which the victims saw their attacker, the inherent stressfulness of that event, the suggestibility of the nighttime show-up, and the presence of other racetrack workers in the area to argue that the identification was mistaken. And the defense presented an alibi witness, a co-worker – like petitioner, Hispanic – who testified that he was with petitioner in one of the barns when the charged offenses occurred. Tr. 17 (Feb. 25, 2010). In response, the prosecution urged the jury to "[w]eigh the credibility of the girls against [the credibility of the alibi witness]." *Id.* 48.

Following a "somewhat lengthy" period of deliberations, J.A. 22, the jury reported that it was unable to reach a verdict on any of the charges. The court therefore gave the jury Colorado's version of an *Allen* charge – an admonition to keep deliberating to try to reach unanimity. "It is your duty," the court told the jurors, "to consult with one another and to deliberate with a view to reaching a verdict." J.A. 68. "In the course of your deliberations do not hesitate to reexamine your own views and change your opinion if convinced that it is erroneous." *Id.*

Late on Friday afternoon, after twelve total hours of deliberations, the jury told the court they had voted to find petitioner guilty on the three misdemeanor charges. Pet. App. 3a; J.A. 69-70. The jury reported it was still unable to reach a verdict on the felony charge. Pet. App. 3a. Noting that things had gotten "very loud" in the jury room just before the jury had emerged, and believing that the jury had "probably done as well as they could do," the court accepted the guilty verdicts and declared a mistrial on the felony charge. J.A. 68-71.

b. Upon dismissing the jurors, the trial court instructed them – following the State's model instructions – that it is "proper" for them to tell others "about your deliberations or the facts that influenced your decision." J.A. 85-86. The judge continued: "whether you talk to anyone is entirely your own decision"; "you may talk with [others] but you need not." *Id.*

Consistent with customary practice in Colorado and elsewhere, defense counsel remained in the courthouse after the jury's dismissal to speak with the jurors. Two jurors stayed longer to talk privately. They explained that, during deliberations, another juror (subsequently denominated Juror "H.C.")[2] had "expressed a bias toward [Petitioner] and the alibi witness because they were Hispanic." Pet. App. 4a (alteration in original).

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[2] In keeping with the Colorado Supreme Court's practice, petitioner refers to the juror at issue by his initials, and the parties have altered passages accordingly in the Joint Appendix where his name appears.

Shortly thereafter, petitioner asked the court for permission to contact the jurors regarding the alleged racially biased statements. Pet. App. 4a; *see also* J.A. 72. The court worked with petitioner's counsel to determine who the two jurors were, provided contact information, and allowed counsel to secure affidavits from the two jurors. *See* J.A. 96-100.

Both affidavits related a number of racially biased statements made by "Juror H.C." *See* J.A. 109-10 (reproducing affidavits). In particular, Juror H.C. allegedly said during deliberations:

- "[The defendant] did it because he's Mexican and Mexican men take whatever they want." Pet. App. 4a.
- "[The defendant] was guilty because in [Juror H.C.'s] experience as an ex-law enforcement officer, Mexican men had a bravado that caused them to believe they could do whatever they wanted with women." *Id.*
- "Mexican men [are] physically controlling of women because they have a sense of entitlement and think they can 'do whatever they want' with women." *Id.*
- "[W]here [Juror H.C.] used to patrol, nine times out of ten Mexican men were guilty of being aggressive toward women and young girls." *Id.*
- "[T]he alibi witness [wasn't] credible because, among other things, he was 'an illegal.'" *Id.* 4a-5a. (The witness had testified during trial that he was a legal resident of the United States. Tr. 14 (Feb. 25, 2010).).

After receiving the affidavits, the trial court acknowledged that Juror H.C. "appear[ed] to be biased based on what he said in the jury room." J.A. 125. And the trial court expressed "regret" concerning this apparent "bias against Mexican men." J.A. 160. But the trial court determined that the juror's expressions of racial animus could "not form the basis of a new trial" because Colorado's no-impeachment rule, codified at Colorado Rule of Evidence (CRE) 606(b), prohibits inquiry into "what happens in the jury room." J.A. 125.[3]

c. Petitioner was sentenced to two years' probation and was required to register as a sex offender. Tr. 24-25 (Nov. 23, 2010). The State, meanwhile, dismissed the felony attempted sexual assault charge. J.A. 6.

3. A divided panel of the Colorado Court of Appeals affirmed. Pet. App. 64a. While the majority faulted petitioner for failing "to sufficiently question jurors about racial bias in voir dire," *see* Pet. App. 45a, the dissent would have held that when post-trial juror testimony suggests that "racial bias" infected

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[3] CRE 606(b), which is substantively identical to Federal Rule of Evidence 606(b), provides: "Upon an inquiry into the validity of a verdict or indictment, a juror may not testify" – save exceptions not implicated here – "as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon his or any other juror's mind or emotions as influencing him to assent to or dissent from the verdict or indictment or concerning his mental processes in connection therewith. A juror's affidavit or evidence of any statement by the juror may not be received on a matter about which the juror would be precluded from testifying."

jury deliberations, "CRE 606(b) must yield to the Sixth Amendment right of [the] defendant." *Id.* 65a.[4] Accordingly, the dissent would have "reverse[d] [petitioner's] conviction and remand[ed] for further proceedings, because the trial court's error is not harmless beyond a reasonable doubt." *Id.*

4. The Colorado Supreme Court affirmed by a 4-3 vote. Pet. App. 1a-27a.

The majority sought guidance primarily in this Court's decisions in *Tanner v. United States*, 483 U.S. 107 (1987), and *Warger v. Shauers*, 135 S. Ct. 521 (2014), both of which dealt with whether applying no-impeachment rules violated the Sixth Amendment. In those two cases, this Court held that the Sixth Amendment posed no barrier to excluding juror affidavits alleging, respectively, that jurors were intoxicated during trial and that a juror was biased against a party because her daughter had caused a car accident similar to the one at issue. This Court explained that requiring courts to consider testimony on those topics was unnecessary because other safeguards allowed defendants in such situations to adequately protect their right to an impartial jury. *See Warger*, 135 S. Ct. at 529; *Tanner*, 483 U.S. at 127. These safeguards were: (1) the ability of trial courts and counsel to observe

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[4] The comments in this case, strictly speaking, were ethnically, not racially, biased. But given this Court's long recognition that the Constitution treats racial and ethnic bias in the same way, particularly in the context of anti-Hispanic bias, *see, e.g.*, *Hernandez v. Texas*, 347 U.S. 475, 477-80 (1954), the Colorado courts understandably treated the concepts as interchangeable. Petitioner does the same.

jurors for signs of misconduct during trial; (2) the ability of jurors to report misconduct before they reach a verdict; (3) the ability of judges and counsel to question jurors about potential bias during voir dire; and (4) the potential availability of nonjuror evidence of juror misconduct. *See id.*

The Colorado Supreme Court acknowledged that "neither *Tanner* nor *Warger* involved the exact issue of racial bias." Pet. App. 14a. And the majority recognized that this Court had stressed in *Warger* – in line with previous cases concerning no-impeachment rules – that "[t]here may be cases of juror bias so extreme" that applying a no-impeachment rule would abridge a defendant's right to an impartial jury. Pet. App. 16a n.6 (quoting *Warger*, 135 S. Ct. at 529 n.3) (alteration in original).

But the majority resisted holding that racial bias presented the kind of extreme situation *Warger* had in mind. The majority admitted that at least one of the *Tanner* safeguards (the ability of the court and defense counsel to observe jurors during trial) was unlikely to uncover racial bias. Pet. App. 15a. But the majority deemed the "remaining *Tanner* safeguards sufficient to protect a party's constitutional right[]" to a jury untainted by racial animus. *Id.* In addition, the Colorado Supreme Court expressed concern over the policy implications of recognizing a constitutional exception to CRE 606(b) for racial bias. It worried that creating such an exception would encourage lawyers to harass jurors after trial. *Id.* The majority was also unable to "discern a dividing line between different *types* of juror bias" and between biased comments of varying "severity." *Id.* 14a-15a (emphasis in original). Finally, it feared that "the

very potential" for investigation into claims of racial bias "would shatter public confidence in the fundamental notion of trial by jury." *Id.* 13a.

Justice Márquez dissented, joined by Justices Eid and Hood. Pet. App. 16a. Noting that most other courts have held that the Sixth Amendment precludes Rule 606(b) from barring the consideration of evidence of racial bias offered to prove a violation of the right to an impartial jury, *see id.* 23a n.4, Justice Márquez agreed with the view that the Rule "must yield to the defendant's constitutional right to an impartial jury." *Id.* 17a. She detailed the ways in which the *Tanner* safeguards are "not always adequate to uncover racial bias before the jury renders its verdict." *Id.* 22a-23a. In addition, Justice Márquez maintained that the majority's reasoning improperly "elevates general policy interests in the finality of verdicts and in avoiding the potential embarrassment of a juror over the defendant's fundamental constitutional right to a fair trial," thereby undermining "public confidence in our jury trial system." *Id.* 18a.

In light of their view that Rule 606(b) must yield to petitioner's constitutional right to an impartial jury, the dissenting Justices would have remanded to allow the trial court "to consider the allegations made in the post-verdict affidavits and to explore the validity of those allegations in an evidentiary hearing." Pet. App. 18a n.1.

5. The Colorado Supreme Court denied rehearing, with two justices noting that they would have granted it. Pet. App. 87a.

6. This Court granted certiorari. 136 S. Ct. ___ (2016).

SUMMARY OF ARGUMENT

An evidentiary rule must yield when it seriously infringes a constitutional right without sufficient justification. Here, applying Rule 606(b) to bar evidence that racial bias infected jury deliberations seriously infringes a defendant's Sixth Amendment right to an impartial jury, and no state interest justifies that infringement.

I. Barring defendants from introducing juror testimony recounting racially biased statements made during deliberations strikes at the heart of the Sixth Amendment's impartial-jury guarantee. Racial animus is constitutionally odious in all forms. It is particularly reprehensible when offered as a reason to convict someone of a crime – and thereby deprive him of his liberty.

Furthermore, when racial bias has tainted deliberations, post-trial testimony from jurors is essential to prove that misconduct. In contrast to the juror intoxication at issue in *Tanner v. United States*, 483 U.S. 107 (1987), racial bias cannot be readily observed by nonverbal cues or proven with physical evidence, such as barroom receipts. Nor, given the dynamics of group decision-making, are jurors likely to interrupt deliberations to notify the court that another juror is making racially biased remarks. Finally, in contrast to the juror partiality in *Warger v. Shauers*, 135 S. Ct. 521 (2014), which arose from the juror's daughter having caused a car crash similar to the one at issue, racial bias will seldom be exposed at voir dire. Defendants are often foreclosed from questioning prospective jurors about race, and even when defendants are allowed to raise the issue,

bigoted jurors will rarely admit they hold socially and legally repugnant views.

II. American law has always recognized various exceptions to no-impeachment rules. Indeed, over twenty jurisdictions already allow courts to consider juror testimony that racial bias infected deliberations when offered to prove a violation of the constitutional right to an impartial jury. This rule has existed in some jurisdictions for decades with no negative side-effects. And analysis confirms what experience suggests: The state interests animating no-impeachment rules do not justify precluding defendants from vindicating their right to jury deliberations untainted by racial bias.

First, allowing courts to consider juror testimony that racial bias infected jury deliberations does not undermine any legitimate discussion in the jury room. When a defendant's life or liberty is at stake, there is no valid interest in creating breathing space for jurors to argue that a defendant should be convicted because of his race.

Nor does permitting jurors to testify regarding claims of racial bias create a problem of attorneys harassing jurors. Attorneys have other, far stronger incentives to contact jurors, and courts already effectively regulate such contact. Allowing defendants to introduce post-trial evidence of racial bias does not appreciably change this situation.

Preserving the finality of convictions is not a significant concern here either. Racial bias is rarely expressed as a reason to convict someone of a crime. When defendants claim it was, courts have procedural tools readily at hand to efficiently determine whether to hold a hearing or grant relief.

The Colorado Supreme Court is also incorrect that precluding the application of Rule 606(b) in this situation would leave courts unable to draw lines between racially biased comments of varying "severity" or between different "types of juror bias," Pet. App. 14a-15a (emphasis omitted). Courts have shown they can distinguish racial bigotry that potentially affects verdicts from mere stray remarks that do not. And this Court has amply demonstrated in related settings that constitutional rules designed to police racial bias do not open the floodgates to claims respecting less pernicious forms of bias. Indeed, this Court has often limited such rules to the arena of race alone.

Finally, the Colorado Supreme Court is mistaken that allowing investigation into claims of racial bias "would shatter public confidence" in the concept of trial by jury, Pet. App. 13a. The populace does not expect jurors invariably to behave properly. But it *does* expect courts to guarantee the basic integrity of the trial process. That being so, permitting courts to turn a blind eye when a jury convicts someone "because he's Mexican," Pet. App. 4a, would be a far greater threat to the legitimacy of our criminal justice system than requiring Rule 606(b) to yield in the grave situation where evidence indicates that racial bias infected jury deliberations.

ARGUMENT

When faced, as in this case, with a claim that applying an evidentiary rule would infringe a constitutional guarantee, this Court determines whether the defendant's constitutional right "outweigh[s]" state interests purportedly advanced by the rule. *Davis v. Alaska*, 415 U.S. 308, 319 (1974).

Indeed, this Court has repeatedly made clear that even the most respected and longstanding evidence rules must yield when they unjustifiably infringe on constitutional rights.

In *Chambers v. Mississippi*, 410 U.S. 284 (1973), for example, the Court held that the Sixth Amendment and the Due Process Clause trump the hearsay rule and the common-law rule categorically prohibiting a party from impeaching his own witness when those rules bar reliable testimony vital to a full defense. *Id.* at 302. Even though "perhaps no rule of evidence has been more respected or more frequently applied" than the hearsay rule, this Court explained, the rule "may not be applied mechanistically to defeat" the constitutional right to present a defense. *Id.*; *see also Holmes v. South Carolina*, 547 U.S. 319, 324-26 (2006) (reaffirming *Chambers*).

Similarly, in *Rock v. Arkansas*, 483 U.S. 44 (1987), this Court held that the rule shared by many states "excluding a criminal defendant's hypnotically refreshed testimony" must yield to the constitutional right to testify in one's own defense when the rule would "disable a defendant from presenting her version of the events for which she is on trial." *Id.* at 49, 61. And in *Washington v. Texas*, 388 U.S. 14 (1967), this Court held that the common-law rule precluding defendants from calling alleged accomplices to testify on their behalf must sometimes yield to the Sixth Amendment. *Id.* at 20-23. Despite the rule's venerable origins predating the Founding era, this Court explained that it must give way when necessary to vindicate the right to secure testimony "relevant and material to the defense." *Id.* at 23; *see also Davis*, 415 U.S. at 319 (1974) (evidentiary rule

barring inquiry into juvenile convictions had to yield to constitutional right to confront and cross-examine adverse witnesses).

This same framework requires the State's no-impeachment rule to yield here. Applying Rule 606(b) to bar evidence that racial bias infected jury deliberations seriously infringes a defendant's Sixth Amendment right to an impartial jury. And no state interest justifies that infringement.

I. Barring Juror Testimony That Racial Bias Infected Deliberations Seriously Infringes The Right To An Impartial Jury.

Juror H.C. advocated for convicting petitioner "because he's Mexican and Mexican men take whatever they want." Pet. App. 4a. Infecting the deliberative process with such racial bias violates the right to an impartial jury. And applying Rule 606(b) to preclude courts from considering juror testimony recounting such statements would leave defendants without any meaningful way to remedy that injustice.

A. The Right To An Impartial Jury Forbids Injecting Racial Bias Into Deliberations.

The Sixth Amendment guarantees all defendants the right to a trial by "an impartial jury." U.S. Const. amend. VI. An impartial jury is one that "decide[s] the case solely on the evidence before it." *Smith v. Phillips*, 455 U.S. 209, 217 (1982); *see also Turner v. Louisiana*, 379 U.S. 466, 472 (1965) (same); *United States v. Burr*, 25 F. Cas. 49, 50 (C.C.D. Va. 1807) (No. 14,692g) (Marshall, C.J.) (An impartial jury, "as required by the common law, and as secured by the constitution," is one that bases its verdict solely

according to "the testimony which may be offered" and "the law arising on it.").

A juror's injection of "racial animus" into deliberations concerning the defendant's guilt strikes at the heart of this right to impartial decision-making. *See Georgia v. McCollum*, 505 U.S. 42, 58 (1992). A jury in a criminal case is a "prized shield against oppression," *Glasser v. United States*, 315 U.S. 60, 84 (1942), and a "safeguard against arbitrary law enforcement," *Williams v. Florida*, 399 U.S. 78, 87 (1970). But racial bias "undermines the jury's ability to perform its function as a buffer against governmental oppression and, in fact, converts the jury itself into an instrument of oppression." 27 Wright & Gold, Federal Practice and Procedure § 6074 (2d ed. 2007); *see also McCollum*, 505 U.S. at 58 (a jury infected with racial bias "distort[s] our system of criminal justice").

The structure and history of the Constitution underscore that bringing governmental power to bear against individuals on the basis of racial stereotypes, while "odious in all aspects, is especially pernicious in the administration of justice." *Rose v. Mitchell*, 443 U.S. 545, 555-56 (1979). "Discrimination on account of race," for example, was "the primary evil" at which the Fourteenth Amendment was directed. *Id.* at 554. Therefore, "[a]t the heart" of this Court's equal protection jurisprudence "lies the simple command that the Government must treat citizens as individuals," not as simply members of "racial" classes. *Miller v. Johnson*, 515 U.S. 900, 911 (1995) (internal quotation marks and citation omitted). "Reduction of an individual to an assigned racial identity for differential treatment is among the most

pernicious actions our government can undertake." *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 795 (2007) (Kennedy, J., concurring in part and concurring in the judgment); *see also id.* at 748, 772-82 (Thomas, J., concurring) (describing Constitution's special prohibition against "mak[ing] decisions on the basis of race").

It is hard to imagine something more antithetical to this constitutional commitment to colorblind decision-making than a jury focusing on a defendant's (or witness's) race as a determinative factor when deciding whether a person is guilty or innocent. The jury is "an essential instrumentality – and appendage – of the court." *Turner*, 379 U.S. at 472. It is the gatekeeper in deciding whether the government should exercise one of its most dramatic and solemn powers: "strip[ing] a man of his liberty or his life." *Id.*; *see also Ring v. Arizona*, 536 U.S. 584, 589 (2002). Our Constitution, therefore, cannot tolerate reliance on racial stereotypes during jury deliberations any more than it could tolerate a judge in a bench trial declaring the defendant guilty because of his racial identity, or a court imposing a longer sentence because of a racial stereotype.

B. Barring Juror Evidence That Racial Prejudice Infected Deliberations Leaves Defendants No Meaningful Opportunity To Vindicate The Right To An Impartial Jury.

1. This Court "has long held that the remedy for allegations of juror partiality is a hearing in which the defendant has the opportunity to prove actual bias." *Smith v. Phillips*, 455 U.S. 209, 215-16 (1982) (citing *Remmer v. United States*, 347 U.S. 227 (1954);

Dennis v. United States, 339 U.S. 162 (1950)). This is because a meaningful opportunity to present evidence of juror bias is part and parcel of the Sixth Amendment right to an impartial jury. That is, the "[p]reservation of the opportunity to prove actual bias is a guarantee of a defendant's right to an impartial jury." *Dennis*, 339 U.S. at 171-72. And "determinations made in [post-trial] hearings [to assess allegations of juror partiality] will frequently turn upon testimony of the juror[s] in question." *Smith*, 455 U.S. at 217 n.7.

At the same time, this Court held in *Tanner v. United States*, 483 U.S. 107 (1987), and *Warger v. Shauers*, 135 S. Ct. 521 (2014), that the Sixth Amendment does not necessarily require that juror testimony be permitted in order to prove a violation of the right to a competent and impartial jury. In *Tanner*, the Court held that Rule 606(b) could constitutionally be applied to exclude jurors' testimony that other jurors had used drugs and alcohol throughout trial. 483 U.S. at 126-27. In balancing the defendants' Sixth Amendment impartial-jury right against the governmental interest in "the protection of jury deliberations from intrusive inquiry," the Court pointed to four safeguards that adequately protected the right in that case: (a) the ability of the court and counsel to observe jurors during trial; (b) the possibility of jurors coming forward and reporting misconduct before a verdict is rendered; (c) the opportunity to conduct voir dire of potential jurors before trial; and (d) the availability of external evidence to prove bias. *Id.* at 127.

In *Warger*, a juror disclosed during deliberations that her daughter had been at fault in a collision similar to the one at issue and added "that if her daughter had been sued, it would have ruined her life." 135 S. Ct. at 524 (internal quotation mark omitted). In holding that Rule 606(b) could constitutionally bar the introduction of this testimony, the Court observed that "in circumstances such as these," the *Tanner* safeguards will generally sufficiently protect the right to an impartial jury, "despite Rule 606(b)'s removal of one means of ensuring that jurors are unbiased." *Id.* at 529.

This Court, however, has always been careful to stress that the Constitution's tolerance for no-impeachment rules is limited. "[I]n the gravest and most important cases," this Court has explained, there may be instances in which juror testimony of juror misconduct "could not be excluded without 'violating the plainest principles of justice.'" *McDonald v. Pless*, 238 U.S. 264, 268-69 (1915) (quoting *United States v. Reid*, 53 U.S. (12 How.) 361, 366 (1851)). Therefore, this Court reaffirmed again in *Warger* that "[t]here may be cases of juror bias so extreme" that applying Rule 606(b) to bar juror testimony proving such bias would run afoul of the Sixth Amendment. 135 S. Ct. at 529 n.3.

2. This is such a case. None of the *Tanner* safeguards adequately protects defendants when a juror infects deliberations with racially biased assertions.

a. *Observation during trial.* The Colorado Supreme Court recognized that "the ability of the court to observe the jury's behavior during trial" does little to protect the defendant in the situation here.

Pet. App. 15a. In contrast to the drunkenness and drug use at issue in *Tanner*, which often manifest themselves in physically apparent ways, racial bias does not. Observable evidence that racial bias might be expressed during deliberations will virtually never arise in or around the courtroom.

b. *Jurors coming forward.* The possibility that jurors may report racially biased remarks before rendering a verdict is remote at best.

For starters, jurors may not realize that racially biased statements made during deliberations are legally impermissible. Jurors are typically instructed – as they were here – to consider the evidence in light of "common sense" and their "observations and experience in life." J.A. 55 (quoting instructions 1 and 3); *see also* Colorado Model Criminal Jury Instruction E:01). Consequently, where jurors couch racially biased assertions in the language of past experience – as Juror H.C. did here when he insisted that "where he used to patrol, nine times out of ten Mexican men were guilty of being aggressive toward women and young girls," Pet. App. 4a – other jurors may assume such statements, though offensive, are legally permissible. This is particularly likely to be a problem – again, as here – where the offending juror is someone of professional or social authority, such as a law enforcement officer.[5]

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[5] The jurors were also instructed here – again, as is typical – that "[y]ou may have to decide what testimony to believe" that "[y]ou should consider all facts and circumstances shown by the evidence which affects the credibility of witness' [sic] testimony." J.A. 56 (quoting instruction 4). So when Juror H.C. argued during deliberations that "the alibi witness [wasn't]

Even where jurors perceive the impropriety of another's conduct during deliberations, they are unlikely to report it. Jurors are encouraged (as they were here) to behave cooperatively and are charged to "consult with one another" to reach consensus. J.A. 68. They are instructed to value each other's perspectives and viewpoints and to strive to find common ground. *See id.* Against this backdrop, formally accusing another juror of being a racist is particularly fraught with the possibility of stirring unwanted conflict – not to mention incurring social anxiety and embarrassment. Jurors are therefore apt to be "unwilling[]" to interrupt deliberations, notify the court, and "confront their peers" from the witness stand concerning racially biased remarks. *Kittle v. United States*, 65 A.3d 1144, 1155 (D.C. 2013).[6]

Where a jury has begun to coalesce as a group around a verdict, these internal pressures only

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credible because, among other things, he was 'an illegal,'" Pet. App. 4a-5a, other jurors may not have thought it necessary to report this (factually inaccurate and morally offensive) remark to the judge.

[6] The traditional and primary means by which a jury communicates with the trial court – through written notes – heightens the social and practical barriers to reporting other jurors' expressions of racial bias. In this case, for instance, the jury was instructed that if questions arose "about the evidence in th[e] case or about the instructions or verdict forms," the "[f]oreperson should write the question on a piece of paper, sign it and give it to the bailiff." J.A. 62-63 (instruction number 20). Requiring that the foreperson be the conduit for all communications with the court makes the reporting of racial bias during deliberations all the more unlikely, especially when the offending juror is the foreperson.

intensify. Once a straw poll has been taken and a majority is leaning towards guilt, dissenters are incentivized to keep quiet and conform. *See* Saul M. Kassin & Lawrence S. Wrightsman, The American Jury on Trial: Psychological Perspectives 174-75, 180-84 (1988); Harry Kalven, Jr. & Hans Zeisel, The American Jury 463 & n.9 (1966). A juror in this circumstance who might contemplate reporting racial bias would have to overcome especially strong group pressures to break ranks and notify the trial court of another juror's malfeasance.

c. *Voir dire.* Questioning potential jurors during voir dire is ineffective at ferreting out jurors likely to interject racial bias into deliberations – particularly where, as here, there is no reason for defense counsel to think race should be an issue at trial at all.

For starters, criminal defendants are not always allowed during voir dire to inquire into whether potential jurors harbor racial bias. Trial courts possess "broad discretion" over the scope and length of voir dire, *Ham v. South Carolina*, 409 U.S. 524, 528 (1973), and they are "understandably hesitant" to allow questions concerning race for fear of "creat[ing] the impression 'that justice in a court of law may turn upon the pigmentation of skin [or] the accident of birth.'" *Rosales-Lopez v. United States*, 451 U.S. 182, 190 (1981) (plurality opinion) (quoting *Ristaino v. Ross*, 424 U.S. 589, 596 n.8 (1976)). Accordingly, courts are not constitutionally required to permit express inquiry into potential racial biases unless "special circumstances" exist. *See Turner v. Murray*, 476 U.S. 28, 37 (1986); *Ristaino*, 424 U.S. at 594. This Court has also declined to exercise its supervisory authority to require such inquiries in federal district

courts absent "a reasonable possibility that racial or ethnic prejudice will affect the jury." *Rosales-Lopez v. United States*, 451 U.S. 182, 191-94 (1981) (plurality opinion).

The facts and holding of *Rosales-Lopez* illustrate the extent of judicial control over any racial questioning during voir dire. There, a defendant of Mexican descent was charged with smuggling undocumented persons into this country. He sought permission to ask during voir dire whether prospective jurors would consider his race in evaluating the case. 424 U.S. at 185-86 (plurality opinion). But the federal district court denied such permission, and this Court held that neither the Constitution nor federal supervisory law dictated otherwise. *Id.* at 186-87, 190-94.

This Court has similarly held that the mere fact that a defendant is of one race and his alleged victims of another does not by itself qualify as a "special factor[]" demanding the defendant be allowed to ask about race during voir dire. *Ristaino*, 424 U.S. at 597-98; *see generally* 76 Am. Jur. Trials 127 § 38 (2000) (same). In run-of-the-mill criminal cases like this one, then, inquiry into potential racial bias may often be foreclosed entirely.

Even when defendants *are* permitted to inquire into racial bias, defense counsel is often well advised not to pose direct questions on the topic. As the Colorado Supreme Court itself recognized, these inquiries "might be viewed as insulting to jurors or as raising an issue defense counsel does not want to highlight." Pet. App. 11a n.5 (quoting *United States v. Villar*, 586 F.3d 76, 87 n.5 (1st Cir. 2009)); *see also* Ted A. Donner & Richard K. Gabriel, Jury Selection

Strategy and Science § 34:1 (3d ed. 2015) (The subject of race "should probably not be specifically addressed, in any voir dire, unless the facts of the case suggest that racism could be a dispositive factor.").

This risk is particularly pronounced where, as here, there is no reason race should be a focal point (or even a relevant consideration) at trial. Instead of suggesting at the outset that jurors' views concerning race are somehow important, defense counsel may reasonably elect to confine voir dire questioning to topics likely to be salient at trial.

Asking direct questions during voir dire about racial bias is usually ineffective anyway. In *Warger*, the partiality at issue sprang from the juror's daughter's involvement in a car accident similar to the one suffered by the plaintiff. 135 S. Ct. at 524. Because partiality along these lines is socially acceptable (and perfectly understandable), it is comfortable for a juror to admit and is thus easily accessible to counsel by direct questioning. By contrast, "it will rarely be productive to ask jurors directly if they will be prejudiced because of the party's race, as a negative answer will virtually always be forthcoming." James J. Gobert et al., Jury Selection: The Law, Art and Science of Selecting a Jury § 7:41 (3d ed. 2015). A "desire to fit in and be accepted by others" – not to mention knowledge of legal bans on race discrimination – often leads jurors to be "less than candid when asked directly about their beliefs and attitudes, particularly in front of strangers in a group setting" such as voir dire. Thomas A. Mauet, Trial Techniques 44 (8th ed. 2010); *see also* Steven Lubet, Modern Trial Advocacy: Analysis & Practice 485-86 (4th ed. 2009). More than

virtually any other form of bias, racial prejudice is generally met with social condemnation and is thus particularly embarrassing to publicly acknowledge.

Defense counsel is therefore frequently left at voir dire to pose only general, open-ended questions about potential bias. But such indirect questions seldom uncover racial animus. In this case, for example, Juror H.C. was asked whether there was "anything about you that you feel would make it difficult for you to be a fair juror" in this case and whether "this is simply not a good case for [you] to be a fair juror." Pet. App. 3a. Juror H.C. did not respond or otherwise disclose his bias. Indeed, few are prone, in the face of open-ended questions, to volunteer that they harbor socially repugnant views.

d. *External evidence.* The Colorado Supreme Court never identified any form of non-juror evidence that could enable defendants to prove that racial bias infected jury deliberations, Pet. App. 15a. Given the obstacles to obtaining and presenting such evidence, the court's silence is unsurprising.

In approving the application of Rule 606(b) to bar juror testimony regarding the misconduct in *Tanner*, this Court pointed to the possibility that trial counsel could use receipts from the lunchtime restaurant where jurors drank to prove intoxication. 483 U.S. at 127. Unlike alcohol consumption, however, racially biased remarks during deliberations cannot be established using barroom receipts or other forms of physical evidence.

Moreover, nonjuror testimony regarding racially prejudiced statements during deliberations rarely exists. Deliberations are, of course, private, and nonjurors cannot report what they cannot see or

hear. Even where such testimony *is* available to defense counsel – for instance, from an eavesdropping bailiff – it does not solve the problem that Rule 606(b) creates here. Rule 606(b) bars "all manner of juror statements" made during deliberations, even if they are conveyed "indirectly through a witness who overheard the statement." 27 Wright & Gold, Federal Practice & Procedure: Evidence § 6074 (2d ed. 2007); *see also* Colo. R. Evid. 606(b) ("[E]vidence of any statement by the juror may not be received on a matter about which the juror would be precluded from testifying."). Indeed, courts in jurisdictions that follow Rule 606(b) bar non-jurors from testifying to statements uttered by jurors even when made outside of the courthouse. 27 Wright & Gold, *supra*, at § 6074.

II. No State Interest Animating Rule 606(b) Justifies Precluding Defendants From Proving That Racial Bias Infected Jury Deliberations.

The secrecy of the jury room is not – and has never been – inviolate. Not only have jurors always been permitted to discuss their deliberations outside of the jury room with whomever they please, *see, e.g.*, J.A. 85-86, but courts in this country have always allowed juror testimony in some circumstances to impeach verdicts. Nevertheless, the Colorado Supreme claimed that various state interests require applying Rule 606(b) even in the rare and grave case where jurors come forward with evidence that another advocated convicting the defendant because of his race. These arguments are unavailing.

A. Courts Have Long Admitted Juror Testimony About Misconduct During Deliberations – Including Injections Of Racial Bias – Without Any Appreciable Negative Effects.

At common law, federal and state courts could consider juror testimony about a variety of acts and statements to impeach verdicts. And today, more than twenty jurisdictions permit courts to consider juror evidence of racial bias, like the affidavits at issue here, when offered for this purpose. In none of these jurisdictions have the various exceptions resulted in any discernable negative effects.

1. *Common law.* Before the codification of evidentiary rules, many states allowed parties in at least some circumstances to introduce juror testimony about what occurred during deliberations to impeach verdicts (for example, when the testimony related to "overt acts" of jurors). *See, e.g.*, *City of Miami v. Bopp*, 158 So. 89 (Fla. 1934) (admitting juror testimony that one juror threatened another in deliberations); *Ruble v. McDonald*, 7 Iowa (7 Clarke) 90 (1858) (admitting juror testimony that jury arrived at its verdict by drawing lots); *Ritchie v. Holbrooke*, 7 Serg. & Rawle 458, 458-59 (Pa. 1821) (admitting juror testimony regarding extraneous information discussed during deliberations); *see also* 8 Wigmore on Evidence § 2354 (3d ed. 1940) (collecting other cases where courts admitted juror testimony to impeach verdicts).

In *Mattox v. United States*, 146 U.S. 140 (1892), this Court followed suit, ruling that federal common law required trial courts to consider juror testimony offered to prove that an "extraneous influence" –

there, a newspaper article – had been discussed during deliberations. *Id.* at 149; *see also Parker v. Gladden*, 385 U.S. 363, 364 (1966) (per curiam) (bailiff's comments as extraneous influence); *Remmer v. United States*, 347 U.S. 227, 228-30 (1954) (bribe offered to juror). Such juror testimony does not "induce tampering with individual jurors subsequent to the verdict," this Court explained, because it is "open to the knowledge of all the jury, and not alone within the personal consciousness of one." *Mattox*, 146 U.S. at 148-49 (quoting *Perry v. Bailey*, 12 Kan. 539, 545 (1874)) (internal quotation marks omitted). Nor does such post-trial testimony unduly threaten the finality of criminal judgments. *Id.* at 148.

2. *Modern approaches.* Today, every state, as well as federal law, continues to allow courts to consider juror testimony in various circumstances when offered to impeach jury verdicts. *See generally* McCormick on Evidence § 68 (7th ed. 2013). The Model Code and Uniform Rules of Evidence, in fact, recommend allowing juror testimony to report any improper statement during deliberations. *See* 27 Wright & Gold, Federal Practice and Procedure § 6074 n.58 (2d ed. 2007). And of particular relevance here, over twenty jurisdictions allow juror testimony about racially biased remarks in the jury room, while only three (including Colorado) have reported decisions expressly barring it.

Nine jurisdictions allow juror testimony regarding racial bias irrespective of any Sixth Amendment imperative. Six states – including large states like California – follow the "Iowa rule," under which juror testimony is permitted to prove any improper statement made during deliberations,

including that "appeals to racial bias [we]re made openly among the jurors," *Powell v. Allstate Ins. Co.*, 652 So. 2d 354, 357 (Fla. 1995).[7] Three other states that have more restrictive no-impeachment rules, including New York, likewise allow juror testimony as a matter of state law where racial bias may have infected deliberations.[8]

The Federal Rules of Evidence, of course, preclude consideration of such evidence. Adopted in 1975 after the Department of Justice lobbied federal lawmakers to reject the advisory committee's recommendation to codify the Iowa rule, Rule 606(b) allows the introduction of juror testimony only to prove that extraneous evidence or an improper outside influence affected deliberations, or that there is a mistake in the verdict. *See* Fed. R. Evid. 606(b); *see also* 27 Wright & Gold, Federal Practice and Procedure § 6071 & n.36 (2d ed. 2007) (recounting history of the rule). Many states have since adopted rules tracking Federal Rule 606(b), and thus

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[7] *See also Grobeson v. City of Los Angeles*, 118 Cal. Rptr. 3d 798, 806 (Ct. App. 2010); *State v. Jackson*, 912 P.2d 71, 80 (Haw. 1996); *Turner v. Stime*, 222 P.3d 1243, 1248 (Wash. Ct. App. 2009). Connecticut also follows the Iowa rule, and the Connecticut Supreme Court has invoked its supervisory power to mandate that lower courts investigate allegations of racial bias – including through the admission of juror testimony. *See State v. Santiago*, 715 A.2d 1, 20 (Conn. 1998). Kansas has adopted the Iowa Rule, *see* Kan. Stat. Ann. § 60-441, but has yet to address the specific issue of racial bias in deliberations.

[8] *See State v. Callender*, 297 N.W.2d 744, 746 (Minn. 1980); *People v. Rukaj*, 506 N.Y.S.2d 677, 680 (App. Div. 1986); *Fields v. Saunders*, 278 P.3d 577 (Okla. 2012).

generally preclude most juror testimony concerning statements made during deliberations.

But even among the jurisdictions that follow Rule 606(b), two federal circuits, six states, and the District of Columbia have deemed the rule unenforceable on constitutional grounds against evidence that racial bias infected deliberations.[9] And three other states that have judicially crafted no-impeachment rules similar to Rule 606(b) likewise deem such evidence admissible on constitutional grounds.[10] These jurisdictions deem these constitutional safety valves essential to "safeguard against the improper consideration of race in criminal trials." *State v. Santiago*, 715 A.2d 1, 19 (Conn. 1998) (citation omitted). At the same time, the jurisdictions believe these exceptions do not undermine "the policy considerations that justify the no-impeachment rule." *Kittle v. United States*, 65 A.3d 1144, 1156 (D.C. 2013).

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[9] *See United States v. Villar*, 586 F.3d 76 (1st Cir. 2009); *Shillcutt v. Gagnon*, 827 F.2d 1155 (7th Cir. 1987); *Fisher v. State*, 690 A.2d 917 (Del. 1996); *Kittle v. United States*, 65 A.3d 1144 (D.C. 2013); *Spencer v. State*, 398 S.E.2d 179 (Ga. 1990); *State v. Hidanovic*, 747 N.W.2d 463 (N.D. 2008); *State v. Brown*, 62 A.3d 1099 (R.I. 2013); *State v. Hunter*, 463 S.E.2d 314 (S.C. 1995); *State v. Shillcutt*, 350 N.W.2d 686 (Wisc. 1984). *But see United States v. Benally*, 560 F.3d 1151 (10th Cir. 2008) (holding that the impartial-jury right does not require Rule 606(b) to yield); *Commonwealth v. Steele*, 961 A.2d 786 (Pa. 2008) (same).

[10] *See Commonwealth v. McCowen*, 939 N.E.2d 735, 764 (Mass. 2010); *Fleshner v. Pepose Vision Institute, P.C.*, 304 S.W.3d 81, 89 (Mo. 2010); *State v. Koedatich*, 548 A.2d 939, 971 (N.J. 1988).

B. The Reasons For Having No-Impeachment Rules Do Not Justify Ignoring Juror Testimony That Racial Bias Infected Jury Deliberations.

Notwithstanding the experiences of the many jurisdictions that have long allowed juror testimony like that at issue here, the Colorado Supreme Court advanced three reasons for barring such evidence: preventing juror harassment, avoiding slippery slope problems, and maintaining public confidence in the jury system. This Court has also noted that, at least in some circumstances, no-impeachment rules may promote finality and "full and frank discussion in the jury room." *Tanner v. United States*, 483 U.S. 107, 120 (1987).

But analysis confirms what other jurisdictions' experiences suggest: The policy rationales underlying Rule 606(b) are insufficient to outweigh a defendant's constitutional right to present evidence that a juror infected deliberations with racial bias. Indeed, even if the *Tanner* factors were effective at screening out many instances of such misconduct (as explained above, they are not), the state interests animating Rule 606(b) would still be insufficient to trump a defendant's right to an impartial jury where juror testimony becomes necessary to prove that racial bias infected deliberations. No-impeachment rules reflect the need to tolerate certain imperfections in the jury room, lest verdicts be subject to constant questioning from the outside. But racism is not just a glitch in deliberative reasoning; it is a constitutionally poisonous ground for depriving someone of his liberty. Consequently, the threat to the judiciary and the public's respect for the rule of law is so profound

when juror testimony indicates that a verdict rests on racial bias that such evidence can never be ignored merely in the name of deliberative secrecy.

1. *Free and frank discussion.* When a defendant's life or liberty is at stake, there is no valid interest in creating breathing space for jurors to argue that a defendant should be convicted because of her race. Thus, allowing courts to consider juror testimony that racial bias infected jury deliberations does not undermine any legally acceptable discussion in the jury room. As the State itself stresses, racial bias "should never be the basis for a verdict." BIO 17.

This Court's decision in *Clark v. United States*, 289 U.S. 1 (1933), reinforces this analysis. There, the federal government prosecuted a juror from a prior case for contempt, alleging she had manipulated her way onto the jury, interjected extraneous information into deliberations, and refused to consider countervailing evidence introduced at trial. *Id.* at 9. To prove its allegations, the prosecution introduced testimony from other jurors recounting the juror's statements and actions during deliberations. *Id.* at 12. Writing for the Court, Justice Cardozo acknowledged that "[f]reedom of debate might be stifled and independence of thought checked if" the content of deliberations were routinely publicized. *Id.* at 13. But while the interest in deliberative secrecy "will prevail in many situations," it "run[s] foul in others of a different social policy, competing for supremacy." *Id.* And in the Court's view, allowing chicanery in the jury room to go unchecked is "too high a price for the assurance to a juror of serenity of mind." *Id.* at 14.

Even more so here. Allowing racial animus in the jury room to go unchecked would be too steep a price to pay for ensuring unfettered conversation during deliberations. It is the *defendant's* liberty, after all, that is at stake in a criminal trial, not any juror's. In addition, the "integrity of the courts" is implicated when judges are confronted with evidence that "racial animus" played a role during jury deliberations. *See Georgia v. McCollum*, 505 U.S. 42, 48, 58 (1992) (quoting *Powers v. Ohio*, 499 U.S. 400, 402 (1991)). The defendant's fundamental right not to be convicted because of the color of his skin, and the judiciary's interest in superintending a system of criminal justice that lives up to our Nation's core principles, necessarily outweighs any interest in unbounded discussion the jury room.

This is particularly true because any effect that holding Rule 606(b) inapplicable here would have on the content of deliberations is negligible at best. In stark contrast to the strict secrecy requirements surrounding grand jury deliberations, *see, e.g.*, Fed. R. Crim. Proc. 6(e)(2), all American jurisdictions already allow petit jurors, after trial, to publicly disclose in any public forum (including on social media, in the newspapers, and throughout the community) any statement made during deliberations.[11] When jurors already know they may

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[11] *See, e.g.*, Peter Manso, *An Unjust Conclusion*, Boston Mag. (Mar. 2007), http://www.bostonmagazine.com/2007/03/an-unjust-conclusion1/ (interviewing jurors about racially biased statements made in deliberations). Indeed, in Colorado, the mandatory jury instruction upon discharge instructs jurors that it is "proper" for them to discuss deliberations with others.

be publicly excoriated for their remarks during deliberations, allowing jurors to also testify in a courtroom in those rare and grave situations where racial bias played a role in a conviction has virtually no marginal impact on the openness of deliberations.

2. *Juror harassment.* Permitting jurors to testify regarding claims of racial bias does not induce attorneys to harass jurors.

Prosecutors and defense lawyers have ample reason – wholly apart from the circumstances here – to talk to jurors after they render their verdicts. As a matter of professional development, not to mention sheer curiosity, attorneys typically stay after trial to discuss their arguments with jurors and ask what they found compelling or decisive. Nancy Hollander & Barbara E. Bergman, Everytrial Criminal Defense Resource Book § 7:1 (2015). Thus, regardless of the existence or content of no-impeachment rules, attorneys in every case have a strong incentive to interview jurors.

In addition, every jurisdiction already has multiple exceptions to no-impeachment rules. So defense lawyers have long had reason – independent of any suspicion of racial bias – to contact jurors to inquire whether any juror misconduct occurred during deliberations. Yet there is no evidence that this incentive to speak with jurors after trial has prompted any harassment by attorneys seeking to

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Model Criminal Jury Instructions Comm., Colo. Supreme Court, *Colorado Jury Instructions Criminal 2015* E:25, http://bit.ly/1YiMHXX; *see also* J.A. 85-86 (delivering this instruction).

overturn unfavorable verdicts. Indeed, even in states such as California that allow jurors to testify regarding *anything* said during deliberations, there is no evidence that juror harassment is a problem. And many states with narrow exceptions for cases of racial bias have recognized these exceptions for decades without any discernible harassment effect. *See, e.g., People v. Whitmore*, 257 N.Y.S.2d 787 (Sup. Ct. 1965); *State v. Callender*, 297 N.W.2d 744 (Minn. 1980).

Attorneys do not harass jurors concerning the content of deliberations because state law, ethical rules, and the courts effectively regulate attorney-juror contact. Colorado's Rules of Professional Conduct, for example, prohibit communications with jurors that involve "misrepresentation, coercion, duress or harassment." Colo. R. Prof'l Conduct 3.5(c)(3).[12] And some federal courts have local rules requiring attorneys to seek the court's permission before initiating contact with jurors. *See, e.g.*, D. Md. Adm. R. 107(16) ("Unless permitted by the presiding judge, no attorney or party shall directly or through an agent interview or question any juror, alternate juror or prospective juror with respect to that juror's

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[12] Indeed, the same jury instruction that tells jurors that they may discuss the case with others after a verdict is reached also tells jurors to report to the court anybody who "persists in discussing the case over your objection." Model Criminal Jury Instructions Comm., Colo. Supreme Court, *Colorado Jury Instructions Criminal 2015* E:25, http://bit.ly/1YiMHXX. The Colorado courts have recognized that instructions and attorneys' professional obligations create a "safe zone" for jurors. *Stewart ex rel. Stewart v. Rice*, 47 P.3d 316, 325 (Colo. 2002).

jury service."); E.D. Mo. L.R. 47-7.01 ("Attorneys and parties to an action shall not initiate, directly or indirectly, communication with any petit juror, relative, friend or associate thereof at any time concerning the action, except with leave of Court.").

There is no evidence that these rules are ineffective in the context of racial bias. *See* Cert. Amicus Br. of Retired Judges at 3-5. And the trial court's careful management of defense counsel's contact with jurors here certainly precluded any harassment. *See* J.A. 96-100. If attorneys in the future were to harass any jurors while investigating any suspicions of bias, courts could address that problem by denying evidentiary hearings where "the defeated party's counsel obtains information from jurors in violation" of the professional code of conduct. *Id.* at 5 (citing *Baker v. Gile*, 257 N.W.2d 376, 377-78 (Minn. 1977)).

3. *Finality.* Given the existing exceptions to Rule 606(b) and other no-impeachment rules, a narrow exception for allegations of racial bias does not unduly disturb the finality of verdicts.

This Court has concluded in a variety of contexts that existing exceptions to a rule can "diminish" the strength of the government's rationale "in the first place." *City of Ladue v. Gilleo*, 512 U.S. 43, 52 (1994); *see also Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 432-33 (2006). That principle applies here. Given that finality yields under Rule 606(b) when extraneous prejudicial information, an outside influence, or a mistake affects the verdict, the State could not credibly assert that allowing its no-impeachment rule also to give way in the exceptional case of racial

bias would meaningfully undercut any interest in the finality of verdicts.

In any case, the post-trial litigation that flows from allowing jurors to testify regarding racial bias is minimal. Defendants seldom have any basis to claim that racial bias infected jury deliberations. And even when they raise such claims, courts can dispose of many without holding a hearing. *See, e.g.*, *State v. Santiago*, 715 A.2d at 18 (A trial court may "rightfully be persuaded, solely on the basis of the allegations before it," that the defendant is not entitled to relief) (citation omitted). This comports with how courts in Colorado and elsewhere screen claims under other exceptions to no-impeachment rules. Courts recognize that "[n]ot every allegation of [juror misconduct] requires an evidentiary hearing." *See United States v. Moses*, 15 F.3d 774, 778 (8th Cir. 1994). Only when a juror affidavit credibly describes a prima facie case of juror misconduct do courts conduct further proceedings to assess the claim. *See id.*; *Wiser v. People*, 732 P.2d 1139, 1142 (Colo. 1987).

It is no surprise, then, that verdicts are rarely disturbed because of racially biased deliberations. Among the more than twenty jurisdictions that consider juror affidavits to substantiate allegations of racial bias, there appear to be only about two dozen appellate decisions (out of only a few dozen appeals) requiring new trials. *See* Cert. Amicus Br. of Ctr. for Admin. of Criminal Law 18-22. In short, defendants rarely seek new trials based on racial prejudice during deliberations – and when they do, those claims are usually meritorious.

4. *Administrability.* The Colorado Supreme Court maintained that if the Sixth Amendment required suspending Rule 606(b) with respect to evidence of racial bias, courts would be unable to discern a dividing line between racially biased comments of varying "severity" or between different "types of juror bias." Pet. App. 14a-15a (emphasis omitted). Not so.

a. Courts can – and regularly do – distinguish between racially biased comments that may be sufficiently serious to warrant relief and those that are not.

In jurisdictions where juror testimony of racial bias is already permitted, "not every stray or isolated off-base statement made during deliberations" requires post-trial proceedings. *United States v. Villar*, 586 F.3d 76, 87 (1st Cir. 2009). Instead, courts typically distinguish racial comments related to guilt – like the ones here – from disconnected remarks that do not demand court intervention.

Two decisions illustrate this dichotomy. In *Commonwealth v. Laguer*, 571 N.E.2d 371 (Mass. 1991), a Hispanic man was accused of raping a white woman. During deliberations, one juror leveled numerous "racist attack[s]" against the defendant and urged he was guilty because "spics screw all day and night." *Id.* at 375. The Massachusetts Supreme Judicial Court held that if these statements were really made, the defendant was entitled to a new trial. *Id.* at 377. By contrast, in *State v. Brown*, 62 A.3d 1099 (R.I. 2013), a juror allegedly referred to the Native American defendants as "those people" during deliberations but never said anything suggesting the defendant's race provided reason to convict. *Id.* at

1106. The Rhode Island Supreme Court held that such comments did not suggest "[the defendant's] racial or ethnic background" factored into the "jury's decision-making process." *Id.* at 1111.

Courts have long conducted similar inquiries in the context of employment discrimination claims, distinguishing comments indicating that race played a role in the employment action at issue from mere "stray remarks." Mark A. Rothstein et al., *Employment Law* § 2.7, at 289 (5th ed. 2014). *Compare, e.g.*, *Brown v. J. Kaz, Inc.*, 581 F.3d 175, 184-85 (3d. Cir. 2009) (manager's statement when firing employee that "you ain't nothing but the N word" indicated that the employee's discharge was motivated by racial animus), *with Perry v. Woodward*, 199 F.3d 1126, 1134 (10th Cir. 1999) (finding "isolated, disparaging comments" about Hispanics insufficient to support a racial discrimination claim regarding an employee's discharge because the court found no "causal nexus" between the two).

Even under Rule 606(b)'s existing exceptions, courts likewise routinely determine whether misconduct during deliberations is sufficiently serious that it requires a new trial. For example, the Colorado Supreme Court has held that a juror's recitation of dictionary definitions to fellow jurors during deliberations "does not automatically require a new trial." *Wiser*, 732 P.2d at 1141. The question of prejudice in that circumstance turns on "the nature and circumstances" of the conduct. *Id.*; *compare id.* (looking up the definition of "burglary" did not warrant a new trial because there was no reasonable possibility that the conduct prejudiced

the defendant), *with Alvarez v. People*, 653 P.2d 1127, 1131 (Colo. 1982) (looking up "reasonable" warranted a new trial because the juror assessed the reasonableness of her doubts about the defendant's guilt according to the dictionary definition instead of the reasonable-doubt jury instruction). There is nothing preventing courts from conducting similar inquiries here.

Indeed, courts have procedural tools readily at hand to determine the severity of racially infused comments. Upon receiving juror affidavits alleging that expressions of racial prejudice infected deliberations, courts can hold evidentiary hearings to examine the "precise content and context of the statement[s]," *Commonwealth v. McCowen*, 939 N.E.2d 735, 765 (Mass. 2010), as well the statements' relationship to contested matters at trial, *State v. Johnson*, 951 A.2d 1257, 1279-80 (Conn. 2008). Trial courts are "most familiar with the strength of the evidence and best able to determine the probability of prejudice from an inappropriate racial or ethnic comment." *Villar*, 586 F.3d at 88. So entrusting them with the mechanics of these hearings – whether jurors are permitted to testify, the format of questioning, and the content – is fitting.

b. This Court has repeatedly recognized that addressing the particular toxin of racial bias in the criminal justice system does not compel the judiciary to police all potential forms of bias.

For instance, as noted above, this Court held over four decades ago that criminal defendants must sometimes be allowed to question potential jurors during voir dire regarding the subject of race. *See, e.g., Ristaino v. Ross*, 424 U.S. 589, 594, 598 (1976);

Ham v. South Carolina, 409 U.S. 524, 528 (1973). But, while judges must allow questioning of prospective jurors about racial prejudice when there is "a significant likelihood that racial prejudice might infect [a defendant's] trial," *see Ristaino v. Ross*, 424 U.S. 589, 598 (1976), the content of voir dire otherwise remains left to the "sound discretion" of trial courts, *id.* at 594 (quoting *Connors v. United States*, 158 U.S. 408, 413 (1895)). In fact, this Court has explicitly held that trial courts need not permit defendants to inquire into other forms of bias – such as "prejudice against beards" or "a host of other possible similar prejudices." *Ham*, 409 U.S. at 528.

In addition, even though the Constitution requires courts to ensure that "members of a racial group [have not been] purposefully . . . excluded" in setting grand jury rosters, *Rose v. Mitchell*, 443 U.S. 545, 556 (1979), states maintain "wide discretion" in the procedures for grand jury venire, *Norris v. Alabama*, 294 U.S. 587, 593 (1935). Indeed, in the several decades *Rose* has been on the books, this Court has not extended it beyond race.

Even when this Court has elected to extend a constitutional criminal procedure right beyond *racial* bias, it has encountered little difficulty limiting the protection to special categories of bias. Under *Batson v. Kentucky*, 476 U.S. 79 (1986), parties may not use peremptory challenges to strike potential jurors based on their race. This Court later extended this prohibition to gender. *See J.E.B. v. Alabama*, 511 U.S. 127 (1994). At the same time, the Court made clear that nothing in the Constitution prevents parties from exercising peremptory strikes with

respect to "any group or class of individuals normally subject to 'rational basis' review." *Id.* at 143.

So too here, there is no need for this Court to speak in this case beyond the issue of racial bias. And there is nothing about the impartial-jury right that would impede this Court in future cases from limiting the scope of its holding.

5. *Public confidence in the administration of criminal justice.* The Colorado Supreme Court asserted that allowing courts to determine whether racial bias infected jury deliberations would "shatter public confidence" in the concept of trial by jury. Pet. App. 13a. But concerns about public confidence push emphatically in the opposite direction here.

"Both the appearance and reality of impartial justice are necessary to the public legitimacy" of court proceedings "and thus to the rule of law itself." *Williams v. Pennsylvania*, 136 S. Ct. ____, ____ (slip op. at 13) (2016). In particular, "[t]he purpose of the jury system is to impress upon the criminal defendant and the community as a whole that a verdict of conviction or acquittal is given in accordance with the law by persons who are fair." *Powers v. Ohio*, 499 U.S. 400, 413 (1991).

There would be no surer way, therefore, to bring the administration of justice into disrepute than to allow courts to turn a blind eye when evidence shows that jury deliberations were tainted by racial bias. If courts could ignore evidence showing defendants were convicted on the basis of racial stereotypes – even while jurors permissibly disclose it to the press or public at large – the populace may view the judiciary as a "willing participant" in the most odious sort of discrimination. *Georgia v. McCollum*,

505 U.S. 42, 49 (1992) (quotation marks and citation omitted). All the more so when courts in California, South Carolina, New York, and Florida, among others, have long considered such evidence (and, when appropriate, provided remedies for such misconduct) with no negative side effects.

What is more, the Colorado Supreme Court's suggestion that the jury system could not survive the presence of the safety valve proffered here offends the character of our citizenry. This Court has long recognized that jurors generally possess the "intelligence, experience, [and] moral integrity" to serve fairly. *See Batson*, 476 U.S. at 104-05 (Marshall, J., concurring); *see generally Duncan v. Louisiana*, 391 U.S. 145, 154-58 (1968). Surely then, jurors today are not so bigoted, and the system not so fragile, that courts must fear to respond when confronted with the rare allegation that racial bias infected the jury's decision-making process. It would hardly make sense to "prohibit racial . . . bias in jury selection only to encourage it in jury deliberations." *J.E.B.*, 511 U.S. at 153 (Kennedy, J., concurring in the judgment).

* * *

This case does not require this Court to undertake the task of "perfect[ing]" the jury system, Pet. App. 13a (citation omitted). This Court need only hold – as more than twenty jurisdictions already have – that juror testimony revealing express racial animus cannot be ignored. This is especially so where, as here, the offending juror interjected racial bias into a case with questionable evidence in which the jury was clearly struggling to reach a decision. *See supra* at 6-7. To deny petitioner

in this context any genuine opportunity to vindicate his Sixth Amendment right to an impartial jury is to say that the Constitution tolerates Juror H.C.'s argument for tipping the balance toward conviction – that "he did it because he's Mexican," and "nine times out of ten Mexican men [are] guilty," Pet. App. 4a. This cannot be right.

CONCLUSION

For the foregoing reasons, the judgment of the Colorado Supreme Court should be reversed.

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No. 15-606

In the Supreme Court of the United States

MIGUEL ANGEL PEÑA-RODRIGUEZ,
Petitioner,

v.

STATE OF COLORADO,
Respondent.

On Writ of Certiorari to the
Supreme Court of the State of Colorado

BRIEF FOR RESPONDENT

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QUESTION PRESENTED

The "no-impeachment rule," often codified as Rule of Evidence 606(b), prohibits admission of juror testimony to impeach a verdict. In *Tanner v. United States* and *Warger v. Shauers*, the Court held that the no-impeachment rule is consistent with the Sixth Amendment even when it bars evidence that jurors engaged in serious misconduct during trial or expressed bias against one of the parties. The question presented is as follows:

Under *Tanner* and *Warger*, does the Sixth Amendment compel an exception to no-impeachment rules to address allegations that racially biased statements were made during jury deliberations?

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COLO. R. EVID. 606(b) *passim*

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ABA Comm. on Prof'l Ethics & Prof'l Responsibility, Formal Op. (2014) 35

ABA Principles for Jury Trials (2006) 39

AM. LAW INST., MODEL CODE OF EVIDENCE (1942) 53

4 BLACKSTONE, COMMENTARIES (1st ed. 1769) 29

3 MARK S. BRODIN ET AL., WEINSTEIN'S FEDERAL EVIDENCE (2d ed. 2015) 49

120 CONG. REC. H550–51 (daily ed. Feb. 6, 1974) (statement of Rep. Wiggins) 49

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JAMES J. GOBERT ET AL., JURY SELECTION: THE LAW, ART AND SCIENCE OF SELECTING A JURY (3d ed. 2015) 26

WALTER E. JORDAN, JURY SELECTION (1980) 26

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6 WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE (4th ed. 2015) 21, 39, 40

JOHN H. LANGBEIN, THE ORIGINS OF ADVERSARY CRIMINAL TRIAL (Oxford Univ. Press 2010) 50

Cynthia Lee, *A New Approach to Voir Dire on Racial Bias*, 5 U.C. IRVINE L. REV. 843 (2015) 28

LEONARD W. LEVY, THE PALLADIUM OF JUSTICE: ORIGINS OF TRIAL BY JURY (1999) 50

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STEVEN LUBET, MODERN TRIAL ADVOCACY: ANALYSIS & PRACTICE (4th ed. 2009) 26

THOMAS A. MAUET, TRIAL TECHNIQUES (8th ed. 2010) . . 26

1 MCCORMICK ON EVIDENCE (7th ed. 2013) 51, 52

3 MUELLER & KIRKPATRICK, FEDERAL EVIDENCE (4th ed. 2013) 49, 50, 51, 53, 54

NAT'L JURY PROJECT, INC., JURYWORK: SYSTEMATIC TECHNIQUES (Elissa Kraus & Beth Bonora eds., 2d ed. 1997) 27

Okla. Unif. Jury Instructions for Juvenile Cases, 2005 OK 12, 116 P.3d 119 (Okla. 2005) 33

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Samuel R. Sommers, *On Racial Diversity and Group Decision Making: Identifying Multiple Effects of Racial Composition on Jury Deliberations*, 90 J. PERSONALITY & SOC. PSYCHOL. 597 (2006) 37

Samuel L. Sommers & Phoebe C. Ellsworth, *The Jury and Race: How Much Do We Really Know About Race and Juries? A Review of Social Science Theory and Research*, 78 CHI.-KENT L. REV 997 (2003) 44

Samuel R. Sommers & Phoebe C. Ellsworth, *White Juror Bias: An Investigation of Prejudice Against Black Defendants in the American Courtroom*, 7 PSYCHOL., PUB. POL'Y, & L. 201 (2001) 28, 44

ROBERT A. WENKE, THE ART OF SELECTING A JURY (1979) 27

27 WRIGHT & GOLD, FEDERAL PRACTICE & PROCEDURE (2d ed. 2007) 11, 51

BRIEF FOR RESPONDENT

Respondent, State of Colorado, respectfully requests that the Court affirm the judgment of the Colorado Supreme Court.

RELEVANT EVIDENTIARY RULES

Colorado Rule of Evidence 606(b) provides:

> **(b) Inquiry into validity of verdict or indictment.** Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon his or any other juror's mind or emotions as influencing him to assent to or dissent from the verdict or indictment or concerning his mental processes in connection therewith. But a juror may testify about (1) whether extraneous prejudicial information was improperly brought to the jurors' attention, (2) whether any outside influence was improperly brought to bear upon any juror, or (3) whether there was a mistake in entering the verdict onto the verdict form. A juror's affidavit or evidence of any statement by the juror may not be received on a matter about which the juror would be precluded from testifying.

Federal Rule of Evidence 606(b) provides:

> **(b) During an Inquiry into the Validity of a Verdict or Indictment.**
>
> (1) *Prohibited Testimony or Other Evidence.* During an inquiry into the

validity of a verdict or indictment, a juror may not testify about any statement made or incident that occurred during the jury's deliberations; the effect of anything on that juror's or another juror's vote; or any juror's mental processes concerning the verdict or indictment. The court may not receive a juror's affidavit or evidence of a juror's statement on these matters.

(2) *Exceptions*. A juror may testify about whether:

(A) extraneous prejudicial information was improperly brought to the jury's attention;

(B) an outside influence was improperly brought to bear on any juror; or

(C) a mistake was made in entering the verdict on the verdict form.

INTRODUCTION

No one disputes that racial bias is reprehensible and has no place in the jury room. The question here is whether one particular method of addressing racial bias among jurors—post-verdict inquiry into jury deliberations—is constitutionally compelled despite wide acceptance of the no-impeachment rule.

For over a century, the Court has declined to grant exceptions to the no-impeachment rule in the face of serious juror misconduct or bias that violated the Sixth Amendment. In *McDonald v. Pless*, the Court adhered to the no-impeachment rule despite evidence that a verdict was handed down only after "protesting jurors finally yielded" to other jurors' insistence that they ignore the governing law. 238 U.S. 264, 265–66 (1915). In *Tanner v. United States*, a majority of jurors drank alcohol or used drugs during trial and several slept through afternoon proceedings. This clearly violated the defendants' Sixth Amendment rights, but the Court again declined to make an exception to the no-impeachment rule. 483 U.S. 107, 126–27 (1987). Finally, in *Warger v. Shauers*, a car-accident case, a juror revealed during deliberations that her daughter had been involved in a car accident—something the juror had failed to mention during voir dire. The juror was convinced that if her daughter had been sued for the accident "it would have ruined her life." 135 S. Ct. 521, 524 (2014). Although this juror "would have been struck from the jury" had she disclosed her bias during voir dire, the Court once again refused to create an exception to the no-impeachment rule. *Id.* at 530.

In deciding these cases, the Court recognized that our jury system is committed to fairness and includes

numerous safeguards against jury misconduct or bias, making post-verdict invasion of jury deliberations unnecessary. The Court also recognized that, in the context of these safeguards, no-impeachment rules serve interests vital to the jury system. Those same considerations govern this case, despite agreement on all sides that the juror's statements here were highly improper

STATEMENT OF THE CASE

1. ***Factual Background.*** The crimes occurred in the women's bathroom of a barn at a horse racing track. The three victims—sisters aged 14, 15, and 16—lived at one end of the barn with their parents and other siblings. Their father was a jockey. A handful of others also lived in the barn: the Millers, who trained horses, and two horse keepers. One of the horse keepers was a man named Hugo; another was Petitioner, who had lived at the barn for around a week. R. Tr. 4–7, 15, 84, 98, 142–43, 150 (Feb. 24, 2010).

One evening after dark, the girls went to the women's bathroom to take showers. They were in the bathroom for around fifteen minutes when a Hispanic man walked in. All three girls recognized him. The 15-year-old and 16-year-old had seen him talking and drinking beer with Hugo just before they entered the bathroom. The 14-year-old had seen him with Hugo earlier that day. R. Tr. 12–15, 50, 62, 85–87, 103–04, 141 (Feb. 24, 2010).

The man asked the girls if they wanted to "drink or party." They said no. The 15-year-old immediately returned to their family's living area, leaving the other

two girls with the stranger. The 16-year-old twice told the man to get out of the bathroom, but the man asked the girls their names and "came really close" to the 14-year-old. The man then moved toward the door. Rather than leave, however, he turned out the lights. This scared the girls; the 14-year-old demanded that he turn the lights back on. R. Tr. 15, 18, 39, 87, 107–09 (Feb. 24, 2010); R. People's Ex. 1, Env. 1, p. 3.

In the dark, the man groped the two girls. He pulled the 16-year-old so that they were chest to chest, moved his hand down her lower back, and grabbed her buttocks. He put his hand on the 14-year-old's shoulder and moved it toward her breast, but she was able to push him away. "He didn't grab [her breast] or anything"; he was "moving his hand down" when the 14-year-old "grabbed it off" of her. R. Tr. 18–19, 126, 214–15 (Feb. 24, 2010).

The girls fled the bathroom and ran to where their family was staying. They told their parents what had happened and described the man who assaulted them, explaining that they had seen him earlier with Hugo and that he was the man "at the other end of the barn." The only people staying at the other end of the barn aside from Petitioner were the Millers and Hugo, whom the girls knew Based on the girls' description, their father knew that the man was Petitioner. R. Tr. 20, 139–40, 143, 154–55 (Feb. 24, 2010).

The father ran to find Petitioner but was unable to, instead reporting the incident to a security guard. While he spoke to the guard, he saw Petitioner speed away in a pickup truck. The guard called the police. R. Tr. 144–48 (Feb. 24, 2010).

Based on information the girls and their father provided, the police found Petitioner in his truck and arrested him. Although Petitioner denied seeing the girls that evening, he conceded that they had seen each other earlier that day. The police separately drove the 14-year-old and 16-year-old to Petitioner so they could identify him, each viewing Petitioner from within a patrol car at a distance of about ten to fifteen feet. The area where Petitioner was being held was "very well" lit; in addition to parking lot lighting, it was illuminated with spotlights and overhead lights from three patrol cars. R. Tr. 171, 173, 181–83, 185–86, 210–11 (Feb. 24, 2010).

Each of the girls independently identified Petitioner as the man who had harassed them in the bathroom. They had "no doubt" it was him; they recognized him "immediately" and were "100% positive that he was the same man who did it." R. Tr. 23, 111–14, 187–88 (Feb. 24, 2010); R. People's Exs. 11 & 12, Env. 3, pp. 3, 5.

2. ***Jury Selection.*** Petitioner was tried for four crimes: one felony count of attempted sexual assault on a child under the age of 15 (for his conduct toward the 14-year-old), one misdemeanor count of unlawful sexual contact (for his conduct toward the 16-year-old), and two misdemeanor counts of harassment (for his behavior toward both girls). J.A. 10–11; R. Court File Vol. I, p. 17 [1]

Jury selection consumed nearly the first full day of the three-day trial. Before being assembled for

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[1] Petitioner was also charged with driving under the influence, but that charge was dismissed before trial. J.A. 10; Pet. App. 3a.

questioning, members of the venire had completed questionnaires asking for basic information and whether, given the subject matter of the case, they could be fair. In their responses, some venire members admitted harboring biases. One questionnaire stated that the responding venire member was "prejudice[d] at times." Another stated that the venire member had "no tolerance." These questionnaires were given to counsel for both parties before voir dire began. R. Seal., Jury Questionnaires, Juror Nos. 20, 36, pp. 80, 83.

Before bringing the venire members into the courtroom, the presiding judge noted to counsel that "in the past, some of our jurors have been vocal in their dislike of people who aren't in the country legally" and stated that defense counsel could address that issue in voir dire. Within the jurisdiction, defense counsel routinely question the venire regarding jurors' attitudes towards race, ethnicity, or nationality. J.A. 16, 131–32.

Once the venire members were seated in court, the judge explained the voir dire process, admonishing venire members to "listen closely to all the questions" and "answer fully all questions asked by the attorneys or by me." Consistent with Colorado Rule of Criminal Procedure 24(c), counsel for both the People and Petitioner had the right to engage in voir dire questioning. J.A. 16–19.

The judge opened voir dire by asking some basic questions in open court. But the judge also asked sensitive questions about child sex assault, instructing the venire members not to answer publicly and not to raise their hands. Instead, the judge invited venire members to "wait outside the door" so that the bailiff

could "bring you in one at a time" and allow the judge and counsel to "hear from you privately." A dozen venire members did so, raising a range of concerns including traumatic personal or family histories of rape or sexual assault and general feelings of bias. Ten were excused for cause. J.A. 19–23; R. Tr. 52–54, 56–78 (Feb. 23, 2010, morning).

Counsel then conducted their own voir dire examinations. Consistent with Colorado practice, the court allowed counsel freedom during voir dire. The judge did not object to any line of questioning by either party J.A. 23–35; R. Tr. 80–118 (Feb. 23, 2010, morning).

The prosecutor's examination was lengthy, consuming 39 pages of the transcript. Defense counsel followed with questioning of his own. But he explained to the venire that his questioning would not "take very much time"; it consumed only 14 pages of the transcript. He asked no questions about race, ethnicity, or nationality generally. He also asked no questions regarding racial, ethnic, or nationality bias. J.A. 23–35; R. Tr. 80–118 (Feb. 23, 2010, morning).

After counsel together used a total of eleven peremptory strikes, and after the court confirmed neither party "ha[d] a Batson challenge," the jury was seated. J.A. 36; R. Tr. 138–44 (Feb. 23, 2010, morning).

3. ***Trial, Jury Deliberations, and Verdicts***. The prosecution called as witnesses the three sisters, their father, and three sheriff's deputies who had investigated the crimes. The defense called only an alibi witness, who was a legal resident of the United States but had traveled from Mexico to give testimony.

He claimed he was a worker at the racetrack at the time of the crimes and that Petitioner, his friend, had been with him in a stable when the crimes occurred. After this testimony, the defense rested, the court read instructions to the jury, and both sides gave closing statements. R. Tr. 2 (Feb. 24, 2010); R. Tr. 13–14, 16–17, 20–21, 36–37, 40, 49 (Feb. 25, 2010).

The jury began deliberations and continued for the rest of the day. The next day, two hours into their resumed deliberations, they sent a note to the judge saying, "This Jury is Hung Judge." The court gave Colorado's version of an *Allen* instruction[2] and the jury resumed deliberations. That afternoon, the court reported to counsel that the jurors had gotten "very loud for a while," that the court "had to quiet them down," and that afterwards the jury sent a note saying they had reached verdicts on three counts but were unable to reach a verdict on the fourth. The court, after polling the jury to determine whether further deliberations would be fruitful, declared a mistrial on the deadlocked count and received the verdicts. J.A. 2, 67–70; R. Tr. 82 (Feb. 25, 2010); R. Court File Vol. 1 at 182.

The jury found Petitioner guilty of all three misdemeanor charges: one count of unlawful sexual contact as to the 16-year-old, based on that girl's description of Petitioner having pulled her chest-to-chest and grabbed her buttocks, and two counts of harassment, based on his "touch[ing the girls] or subject[ing them] to physical contact." The jury was unable to reach a verdict on the felony count,

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[2] *Allen v. United States*, 164 U.S. 492, 501 (1896).

attempted sexual assault on a child. This charge required proof, beyond a reasonable doubt, that Petitioner took a "substantial step" toward knowingly "touching [the 14-year-old's] intimate parts." She testified, however, that although Petitioner touched her shoulder, he had not grabbed her breast.[3] J.A. 59–62, 71; R. Tr. 126, 214–15 (Feb. 24, 2010).

4. ***Post-Trial Proceedings.*** After the verdicts were rendered and the jury was dismissed, defense counsel spoke with the jurors. Two of them alleged that another juror had made racially biased statements during deliberations. *See* J.A. 77, 83, 109–10.

The court gave defense counsel permission to receive the jurors' contact information and to obtain their affidavits. In doing so, the court concluded that Colorado's no-impeachment rule, codified as Rule of Evidence 606(b), did not allow inquiry into the jurors' internal thought processes or "the actual effect of juror bias" on deliberations.[4] Under state law, the rule allowed the court to consider the proffered affidavits for only one reason: to explore whether any juror had "deliberately misrepresented important information" in

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[3] The evidence on this count had always been less conclusive than the evidence on the other counts. The count was originally charged as consummated sexual assault, but it was bound over after the preliminary hearing as a count for attempt only. Pet. App. 3a.

[4] The biased statements also were not "extraneous prejudicial information" or "outside influence[s]" under the express exceptions set forth in Rule 606(b)(1) and (2). *See* Pet. App. 9a.

response to voir dire questioning.[5] The court noted that both parties had been given ample opportunity to question the venire about potential biases, and any "juror who expressed any hesitation ... was subject, not only [to] the Court's further inquiry, but to inquiry by counsel." J.A. 84, 89–90, 92, 96–98, 108–10.[6]

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[5] A few years after the trial court's ruling below, this Court interpreted Federal Rule 606(b) to apply even when juror testimony is sought to prove that a juror lied in voir dire. *Warger*, 135 S. Ct. at 528. But Colorado continues to admit juror testimony for that purpose under its own version of Rule 606(b). *Black v. Waterman*, 83 P.3d 1130, 1137 (Colo. App. 2003); *see also* 27 WRIGHT & GOLD, FEDERAL PRACTICE & PROCEDURE § 6074, pp. 515–17 (2d ed. 2007).

[6] The district court's management of the post-trial proceedings was careful and thorough. After Petitioner moved for disclosure of jury contact information, the trial court ordered defense counsel to provide details regarding the post-verdict conversation with the jurors. J.A. 72–75. Petitioner filed a second motion for disclosure of jury contact information, accompanied by an affidavit from defense counsel. J.A. 76–79, 83. The judge ordered that defense counsel supplement the motion to identify the jurors' gender, allowing the court to minimize the number of jurors whose contact information would be disclosed. J.A. 96–98. The court instructed defense counsel to personally contact the jurors, rather than delegating the task to an investigator, and to obtain affidavits concerning what was said during deliberations. J.A. 96–98. After receiving the affidavits, the court allowed multiple rounds of briefing, held several hearings, and issued a number of orders to address Petitioner's motion for a new trial. *See* J.A. 150.

According to the affidavits, a juror named H.C. made various offensive remarks:

- he thought Petitioner "did it because he's Mexican and Mexican men take whatever they want";
- he said "Mexican men [are] physically controlling of women";
- he said he was a former law enforcement officer and "where he used to patrol, nine times out of ten Mexican men were guilty of being aggressive toward women and young girls";
- "he did not think the alibi witness was credible because, among other things, he was 'an illegal.'"

J.A. 109–10.

The trial court received briefs from the parties regarding the relevance of these allegations and reviewed a transcript of voir dire. At a hearing, the trial court noted that during voir dire, defense counsel had not asked a single question regarding potential racial, ethnic, or nationality bias. This surprised the judge, who explained that "those questions are always asked." The judge observed that, had defense counsel "asked [a] question in voir dire about Mexican-Americans or people of Hispanic [descent]," H.C. might have "been a strike for cause." "But [H.C.] wasn't asked that question ...." Instead, the questions defense counsel posed were abstract and general: "only, 'Are you being fair?'" J.A. 124, 131–32.

Based on this record, the court determined that H.C. could be called into court for questioning, but defense counsel could not seek testimony regarding his alleged racial bias. Instead, counsel could ask H.C. only about another topic: why he had not disclosed his law enforcement background when asked during voir dire, "Are you or any member of your family or any close acquaintance a law enforcement officer?" J.A. 122, 125, 127

Juror H.C. was subpoenaed and placed under oath at a hearing. He explained that he had been in law enforcement "forty years ago, in the late '60s" and did not believe he was asked during voir dire about his past employment history. Instead, he understood the question to be directed only at "friends or relatives currently." J.A. 145–47.

Petitioner moved for a new trial based on the two juror affidavits and H.C.'s testimony. Due to H.C's "confusion regarding the nature of the question and the length of time since he had been a law enforcement officer," the court concluded that Juror H.C.'s failure to disclose his past law enforcement experience was inadvertent. The court denied the motion for a new trial. J.A. 150, 157–160.

5. ***Appellate Proceedings.*** The Colorado Court of Appeals affirmed. In rejecting Petitioner's as-applied Sixth Amendment challenge to Rule 606(b), the court concluded that Petitioner's failure to conduct voir dire on the topic of racial bias waived his objections. According to the court, "a defendant cannot claim his rights were violated when an opportunity existed to protect those rights but his counsel failed to do so for tactical reasons." Pet. App. 50a, 56a, 64a.

One judge dissented; he would have held that the Sixth Amendment compels an exception to Rule 606(b) only for "bias against distinct racial groups." The dissenter did not address whether further exceptions would be required for biases based on "gender, religion, sexual orientation, or immigration status." Pet. App. 65a, 84a & n.7

The Colorado Supreme Court also affirmed but did not base its ruling on waiver. Pet. App. 11a n.5. Instead, after analyzing *Tanner* and *Warger*, the court held that application of Rule 606(b) did not violate Petitioner's Sixth Amendment right to an impartial jury. The court reasoned that, "[c]ombined, *Tanner* and *Warger* stand for a simple but crucial principle: Protecting the secrecy of jury deliberations is of paramount importance in our justice system." The court identified the vital interests served by no-impeachment rules, including protecting the finality of verdicts, ensuring full and frank jury deliberations, promoting the jury's independence, and preserving public confidence in the jury system. It explained that creating exceptions to the rule based on "different *types* of juror bias or misconduct" would be "arbitrary," given that the Sixth Amendment itself does not draw such lines. Finally, it reasoned that the safeguards this Court relied upon in *Tanner* and *Warger* "protect a party's constitutional right to an impartial jury." Thus, carving a racial-bias exception from the no-impeachment rule "would ignore both the policy underlying [Rule] 606(b) and the unwavering Supreme Court precedent emphasizing the magnitude of that policy." Pet. App. 11a n.5, 13a–16a.

Three justices dissented. They would have carved out an exception to Rule 606(b), but only for "evidence of racial or ethnic bias." Pet. App. 17a, 25a. The dissenters were skeptical that any procedural safeguard except post-verdict examination of jurors would detect and correct racial bias. And although they acknowledged that "[t]he policies of finality and juror privacy that underlie [Rule] 606(b) are well founded," they believed that an exception to the rule would not undermine those policies. Pet. App. 17a, 25a–26a.

This Court granted certiorari.

SUMMARY OF THE ARGUMENT

The Court's decisions in *Tanner* and *Warger* are dispositive of this case.

I. *Tanner* and *Warger* identified four procedural safeguards that assure the integrity of the jury system. Those safeguards effectively detect and address racial bias among individual jurors. In addition, three other important trial procedures counteract the potential for racial bias on juries.

A. The first *Tanner* safeguard is voir dire, a critical part of trial. During voir dire, judges and attorneys use a number of techniques to extensively probe jurors regarding their potential biases, including biases involving personal and sensitive topics. Racial attitudes are among them. The case law demonstrates that voir dire on racial bias is effective; indeed, this Court has constitutionally mandated voir dire on racial bias in certain cases. Conducting voir dire on that topic also amounts to sound trial strategy, particularly in cases involving interracial sex assault. And voir dire is widely available to probe racial attitudes. In Colorado,

for example, defense counsel have the legal right to question prospective jurors about racial prejudice.

B. The other three safeguards identified in *Tanner* and *Warger* are likewise effective. Jurors are willing and able to report the improper racial comments of fellow jurors and have done so in many past cases. Nonjuror evidence is also available, particularly in the age of social media. Finally, courthouse staff constantly interact with jurors, providing opportunities to observe jury members and overhear biased remarks.

C. In addition to the *Tanner* safeguards, three other trial procedures counteract racial bias on juries. First is the fair-cross-section requirement of the Sixth Amendment, which guarantees that jury wheels include each distinctive demographic group that exists within the defendant's community. This emphasizes to the public and to jurors the democratic nature of the jury system and contributes to the overall impartiality of the jury. Colorado is especially committed to the fair-cross-section requirement, prohibiting jury selection practices that cause even de minimis differences between the makeup of jury pools and the overall population. Second is *Batson v. Kentucky*, which guarantees that voir dire serves the purpose it was meant to serve—selecting jurors based on their ability to fairly evaluate the evidence. Third, jury size and unanimity requirements enhance the deliberative process and ensure that verdicts are based on the evidence and the law rather than one juror's improper considerations.

II. In the context of these safeguards, the no-impeachment rule serves interests vital to the jury system.

A. No impeachment rules serve five vital government interests.

First, as the Court held in *Tanner* and *Warger*, an exception to the no-impeachment rule would expose jurors to post-verdict examination regarding their internal deliberations and thereby inhibit full and frank discussion in the jury room. This Court's precedent reflects concern that post-verdict examination of jurors will not only inhibit discussion of improper topics but will dampen full and frank discussion overall. Petitioner's proposed exception may also have the effect of driving racial bias underground, where it can neither be confronted nor corrected by fellow jurors or the court.

Second, exceptions to the no-impeachment rule undermine the finality of jury verdicts, potentially delaying final resolution of a case for months or years. Given that Petitioner's proposed exception for racial bias would apply nationwide in both the criminal and civil context, and would likely be expanded to other biases and juror misconduct, the threat to verdict finality is substantial.

Third, exceptions to the no-impeachment rule exacerbate incentives to harass jurors. *Warger* rejected the argument that the interest in preventing juror harassment is minimal merely because jurors may voluntarily disclose information about their deliberations and because ethical rules govern interactions between counsel and jurors.

Fourth, public confidence in the jury system would suffer if profoundly disturbing juror misconduct, like that at issue in *Tanner*, were insulated from scrutiny, while other misconduct triggered an exception to the no-impeachment rule.

Finally, the no-impeachment rule has long fostered jury independence. Retrying a jury's verdict post-trial undermines the centrality of the lay jury, rather than the professional judge, to the criminal justice system.

B. In crafting their no-impeachment rules, jurisdictions like Colorado have carefully balanced the policies animating them. Petitioner's proposed exception would undermine those policy judgments. It would require Colorado and the federal system to draw lines among different types of biases, leading to unfair outcomes among defendants with substantial Sixth Amendment claims that fall outside Petitioner's rule.

ARGUMENT

Because "state and federal rulemakers have broad latitude under the Constitution to establish rules excluding evidence from criminal trials," state evidentiary rules withstand constitutional challenge unless they "serve no legitimate purpose or ... are disproportionate to the ends that they are asserted to promote." *Holmes v. South Carolina*, 547 U.S. 319, 324, 326 (2006) (quotation marks and alteration omitted). In *Tanner* and *Warger*, this Court rejected Sixth Amendment challenges to the no-impeachment rule, holding that several mechanisms within the trial process protect a defendant's right to an impartial jury and, in the context of those safeguards, the rule serves

interests crucial to the jury system. That same analysis applies here.

Petitioner's attempt to distinguish *Tanner* and *Warger* amounts to an attack on the reasoning of those decisions and the principles underlying them. But the basis of those decisions remains sound and applies equally in the circumstances of this case.

I. Safeguards throughout the trial process effectively address the potential for racial bias among prospective and sitting jurors.

The legal system has developed safeguards against juror bias that operate without intruding into the jury's internal deliberations. In *Tanner* and *Warger*, this Court held that because a defendant's "Sixth Amendment interests ... are protected by several aspects of the trial process," constitutional exceptions to no-impeachment rules for juror competency and juror bias are unwarranted. *Tanner*, 483 U.S. at 127 These safeguards need not be effective in every case. *Warger*, 135 S. Ct. at 529 ("Even if [voir dire fails to detect a particular form of bias] juror impartiality is adequately assured by [other safeguards]."). The safeguards work in combination to adequately protect the right to a fair trial. Even in "cases of juror bias so extreme that, almost by definition, the jury trial right has been abridged," the question is "whether the usual safeguards are or are not sufficient to protect the integrity of the process." *Id.* at 529 n.3.

Petitioner's case depends on his establishing that, without a post-verdict inquiry into internal jury deliberations on questions of racial bias, defendants will have "no meaningful opportunity to vindicate the

right to an impartial jury." Pet. Br. at 19, 21. This is not true. The safeguards that led this Court in *Tanner* and *Warger* to uphold the no-impeachment rule in the face of serious misconduct and bias apply equally to this case. And beyond the safeguards this Court relied on in *Tanner* and *Warger*, additional protections within the trial process vindicate the right to an impartial jury.

A. Voir dire is a proven and sometimes constitutionally compelled safeguard against the racial bias of potential jurors.

Voir dire "plays a critical function in assuring the criminal defendant that his Sixth Amendment right to an impartial jury will be honored." *Rosales-Lopez v. United States*, 451 U.S. 182, 188 (1981) (plurality opinion). Indeed, less than two years ago this Court affirmed that voir dire "can be an essential means of protecting this right." *Warger*, 135 S. Ct. at 528–29. Bringing the defendant "face to face, in the presence of the court, with each proposed juror," and giving him "an opportunity ... for ... inspection and examination ... is required for the due administration of justice" and is "one of the most important of the rights secured to the accused." *Pointer v. United States*, 151 U.S. 396, 408–09 (1894).

Given its critical importance, "[t]he voir dire in American trials tends to be extensive and probing." *Swain v. Alabama*, 380 U.S. 202, 218–19 (1965). "Every experienced trial lawyer knows that the ritualistic global inquiry to the entire panel by the trial judge is only the beginning in sensitive cases. The questioning that goes *beyond* this opening ritual is the essence of voir dire." *United States v. Greer*, 968 F.2d 433, 443

(5th Cir. 1992) (en banc) (opinion of Higginbotham, J.). Most States use some combination of judge and attorney questioning and, often, questioning is done both "en masse" and juror-by-juror. 6 WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 22.3(a), pp. 100–01 & n.45 (4th ed. 2015). This questioning often delves into sensitive topics. *Id.* p. 92. But "[c]ourts routinely assure prospective jurors through a variety of methods that their private information need not be disclosed to the public." *State v. Strode*, 217 P.3d 310, 320 (Wash. 2009). For example, juror questionnaires, distributed before oral questioning of the venire, "give explicit assurances of confidentiality." *Id.* And judges "commonly allow jurors to approach the bench and discuss sensitive matters there" or conduct "in chambers discussions." 6 LAFAVE, CRIMINAL PROCEDURE, at § 22.3(a), p. 92.

Here, voir dire consumed nearly the first full day of a trial that lasted only three. The jurors answered written questions, were examined in open court by the judge and counsel for both parties, and were invited to raise sensitive issues in private. The judge granted counsel significant freedom during voir dire, never objecting to any questions asked by counsel for either party. Yet defense counsel decided not to "take very much time" with voir dire and declined to ask any questions at all about race, ethnicity, or nationality. J.A. 16, 23–35, 131–32.

Petitioner asserts that "there [was] no reason for defense counsel to think race should be an issue at trial at all" and that it was not a "relevant consideration." Pet. Br. 24, 26. The record refutes this assertion: this case presented allegations of an interracial sexual

assault against children; two jurors disclosed in questionnaires that they were "prejudice[d] at times" or had "no tolerance"; the judge warned defense counsel of jurors' potential bias against undocumented immigrants; and voir dire on racial bias is common in the jurisdiction. J.A. 16, 131–32; R. Seal., Jury Questionnaires, Juror Nos. 20, 36, pp. 80, 83. Indeed, this Court has acknowledged that cases involving interracial crimes—such as the interracial sex assault here—are among those in which racial prejudice is likely to be a factor for biased jurors. *See Turner v. Murray*, 476 U.S. 28, 36 n.8 (1986) (plurality opinion) (requiring voir dire on racial bias because "it is plain that there is some risk of racial prejudice influencing a jury whenever there is a crime involving interracial violence"); *see also Commonwealth v. Hobbs*, 434 N.E.2d 633, 641 (Mass. 1982) (mandating voir dire on racial bias in all trials involving interracial sexual offenses against children).

Dismissing the record and the case law, Petitioner demotes voir dire from one of the Sixth Amendment's most important constitutional safeguards to a procedural bump in the road through trial. He argues that (1) voir dire is ineffective at discovering racial bias, (2) inquiring into venire members' racial attitudes amounts to poor trial strategy, and (3) voir dire is subject to too much judicial control to be a reliable safeguard. Pet. Br. 24–28. He is incorrect on all three counts.

1. ***Effectiveness***. Voir dire on racial bias is not only effective; sometimes it is constitutionally compelled. *Turner*, 476 U.S. at 36–37 (requiring voir dire "on the issue of racial bias" in interracial capital

cases); *Ham v. South Carolina*, 409 U.S. 524, 525–28 (1973) (requiring courts to grant voir dire on racial bias when "essential fairness" demands it). And even when it is not required by the Constitution, "the wiser course generally is to propound appropriate questions designed to identify racial prejudice if requested by the defendant." *Ristaino v. Ross*, 424 U.S. 589, 597 n.9 (1976). The Court has thus committed to use its "supervisory power" over federal courts to require voir dire on racial bias at a defendant's request. *Id.* at 597 n.9, 598 n.10.

This Court's conclusion that voir dire on racial bias is an appropriate exercise of judicial discretion and is mandatory in cases involving some interracial crimes cannot be squared with Petitioner's assertion that voir dire on racial bias is ineffective or counterproductive. Pet. Br. 25–26. Voir dire on racial bias is constitutionally required precisely because it is effective. *See Turner*, 476 U.S. at 36 (plurality opinion) (emphasizing "the ease with which [the] risk [of racial bias] could have been minimized" through voir dire). Court decisions repeatedly demonstrate its effectiveness.[7]

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[7] *See, e.g., Brewer v. Marshall*, 119 F.3d 993, 995–96 (1st Cir. 1997) (after the court conducted "an individual voir dire on racial and ethnic bias ... against black persons or persons of Hispanic origin .... one juror had been excused due to racial bias"); *United States v. Hasting*, 739 F.2d 1269, 1271 (7th Cir. 1984) (after the court's "specific reference to racial prejudice" one woman "indicated that the race of the participants of the trial would affect her verdict"); *United States v. Barnes*, 604 F.2d 121, 136 (2d Cir. 1979) (several prospective jurors "admitted some prejudice against blacks" and were excused); *Kelly v. Hendricks*, No. 03-2536, 2005 WL 2897499, at *6 (D.N.J. Oct. 31, 2005) (holding that a state trial court's

Despite this case law, Petitioner argues that jurors will not disclose racial prejudice because it "is generally met with social condemnation" and is "embarrassing to publicly acknowledge." Pet. Br. 27. But this ignores that, as part of the voir dire process—which is conducted under penalty of perjury and the threat of contempt—"potential jurors are often asked sensitive and potentially embarrassing questions." *Greer*, 968 F.2d at 443 (en banc) (opinion of Higginbotham, J.). Petitioner's argument also ignores that voir dire may be conducted to encourage candid responses even when it probes delicate topics.

For example, counsel can request that questions about racial bias be included in juror questionnaires, the answers to which are confidential and not shared with the rest of the venire. *See People v. Harlan*, 8 P.3d 448, 500 (Colo. 2000) ("The trial court took precautions at the outset of the trial to foreclose the injection of improper racial considerations by including questions concerning racial issues in the jury questionnaire."); *State v. Long*, 575 A.2d 435, 469 (N.J. 1990) (Handler, J., concurring in part and dissenting in part) (explaining that four jurors were excused as a result of

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general voir dire "was sufficient to elicit racial bias as to two prospective jurors, who were then excused for cause"); *People v. Harlan*, 8 P.3d 448, 500 (Colo. 2000) ("The trial court ... removed a juror from the venirepool due to the juror's bias against African-Americans."); *see also State v. Tucker*, 629 A.2d 1067, 1077 n.20 (Conn. 1993); *Commonwealth v. Seabrooks*, 743 N.E.2d 831, 835 (Mass. 2001); *Commonwealth v. Jackson*, 7 N.E.3d 494, 85 Mass. App. Ct. 1117, at *2 (May 1, 2014) (unpublished); *State v. Harris*, 716 A.2d 458, 480 (N.J. 1998); *State v. Long*, 575 A.2d 435, 469 (N.J. 1990) (Handler, J., concurring in part and dissenting in part); *State v. Williams*, 860 P.2d 860, 864 (Or. Ct. App. 1993).

their answers to a questionnaire inquiring into racial bias). The court here used a questionnaire that asked sensitive questions about "incest, sexual assault, or rape" while admonishing venire members not to "show this questionnaire to anyone or discuss it" and assuring that their answers were "NOT A PUBLIC RECORD." J.A. 13–14. Petitioner made no attempt here to include questions about racial attitudes on the questionnaire.

Counsel may also seek to question potential jurors privately, outside the presence of other venire members. *Turner*, 476 U.S. at 37 (mandating voir dire on racial bias and holding that "the trial judge retains discretion ... to question the venire individually or collectively"); *Brewer v. Marshall*, 119 F.3d 993, 995–96 (1st Cir. 1997) ("The judge asked each juror, out of the presence of other jurors, whether they had any bias or prejudice for or against black persons or persons of Hispanic origin."); *Commonwealth v. Jaynes*, 770 N.E.2d 483, 491 & n.10 (Mass. App. Ct. 2002) (explaining that sixteen prospective jurors asked to be questioned in private and eight were excused for cause, including "one who disclosed racial bias"). That option was available in this case. A dozen venire members responded to the judge's invitation for private questioning. R. Tr. 56–78 (Feb. 23, 2010, morning). Another venire member was questioned privately after he disclosed, in response to questions from counsel, that he was familiar with the defendant. *Id.* at 119–20. Nothing prevented defense counsel from privately questioning jurors about their attitudes toward race, ethnicity, and nationality, or requesting that the judge do so.

Petitioner nonetheless asserts that lawyers lack techniques for effectively eliciting honest answers about racial bias. He quotes three practice guides for the proposition that it will rarely be productive to ask jurors "directly" about racial beliefs and other prejudicial attitudes. Pet. Br. 26. Yet in each of those books, the very next sentences explain that counsel should therefore ask prospective jurors *indirectly* about potential biases, and the books go on to give specific advice about how to do so. JAMES J. GOBERT ET AL., JURY SELECTION: THE LAW, ART AND SCIENCE OF SELECTING A JURY § 7:41 (3d ed. 2015) ("Rather, the issue should be approached more indirectly. ... The following sections are concerned with voir dire of individual jurors in order to reveal racial prejudice."); STEVEN LUBET, MODERN TRIAL ADVOCACY: ANALYSIS & PRACTICE 485–86 (4th ed. 2009) (prescribing indirect questions and assuring that "a resourceful advocate will easily be able to come up with more and better keys to the potential juror's thoughts and attitudes"); THOMAS A. MAUET, TRIAL TECHNIQUES 44–60 (8th ed. 2010) (explaining that "likely beliefs and attitudes are more accurately learned through indirection," and offering methods that "result[ ] in jurors voluntarily disclosing the information you need to intelligently select jurors for th[e] case").[8] Indeed, as the Court of

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[8] Other books offer similar advice. *See, e.g.*, JEFFREY T. FREDERICK, MASTERING VOIR DIRE AND JURY SELECTION 131–134 (3d ed. 2011) (explaining how to ask questions to elicit answers from reluctant venire members); WALTER E. JORDAN, JURY SELECTION 237–238 (1980) (giving an example of how to avoid the use of the word "prejudice" in exploring racial bias, and explaining that, if the word is unavoidable, counsel can still get forthcoming answers by softening the use of the term); JOEL D. LIEBERMAN & BRUCE D.

Appeals observed below, at trial defense counsel used "similar techniques," just "not in the context of race." Pet. App. 51a–52a. Open-ended questions that fail even to obliquely raise racial bias are not, as Petitioner argues, the only option. Pet. Br. 27

2. ***Strategy***. Petitioner asserts that asking "direct questions" about racial bias also amounts to poor trial strategy, because it might be viewed as insulting or might "rais[e] an issue defense counsel does not want to highlight." Pet. Br. 25.[9] Again, direct questions about racial bias are not the only option, nor are they the most effective. *See supra*, pp. 26–27. But, in any event, if lawyers could not raise uncomfortable topics without offending venire members, voir dire would be of little use. *See Greer*, 968 F.2d at 442 (en banc) (opinion of Higginbotham, J.) ("[S]o long as racial and ethnic prejudices are part of the human condition, we cannot

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SALES, SCIENTIFIC JURY SELECTION 114–115 (2007) (suggesting that venire members are "less likely to admit inability to adhere to due process guarantees when questions were framed in a manner in which a single word answer would suffice"); ROBERT A. WENKE, THE ART OF SELECTING A JURY 66 (1979) (suggesting that rather than ask if a prospective juror is "prejudiced," attorneys should ask about the juror's "feeling," "belief," or "opinion"); *see also* NAT'L JURY PROJECT, INC., JURYWORK: SYSTEMATIC TECHNIQUES § 17.03[4][a] (Elissa Kraus & Beth Bonora eds., 2d ed. 1997) (listing examples of open-ended, indirect questions to explore racial bias).

[9] The book Petitioner quotes for the proposition that race "should probably not be specifically addressed" in voir dire concedes that cases involving interracial sexual offenses are candidates for voir dire on racial bias. TED A. DONNER & RICHARD K. GABRIEL, JURY SELECTION STRATEGY AND SCIENCE §§ 34:2–3, pp. 743–45 (3d ed. 2015) (cited in Pet. Br. 26).

will them away by refusing to probe both for their presence and their reach in a given case. Stoic pretense will not do."). Here, for example, jurors were questioned about intensely sensitive topics, and voir dire on questions of race, ethnicity, and nationality are common in the jurisdiction. J.A. 21–22, 131–32. Thus, it is unlikely that any venire member would have been surprised, let alone insulted, by being asked about racial bias. Indeed, merely asking questions regarding race and ethnicity can counteract racial bias. Cynthia Lee, *A New Approach to Voir Dire on Racial Bias*, 5 U.C. IRVINE L. REV 843, 860–72 (2015); Samuel R. Sommers & Phoebe C. Ellsworth, *White Juror Bias: An Investigation of Prejudice Against Black Defendants in the American Courtroom*, 7 PSYCHOL., PUB. POL'Y, & L. 201, 222 (2001); *see also Commonwealth v. McCowen*, 939 N.E.2d 735, 768 n.3 (Mass. 2010) (Ireland, J., concurring) (suggesting that "simply asking jurors these types of questions calls the issue of race to their attention, ... making it more likely that juror bias will be reduced").

If an attorney conducts voir dire on a sensitive subject such as race and is concerned that a line of questioning offended a venire member, the attorney may use a peremptory challenge. Indeed, granting the freedom to ask tough questions is one of the central purposes of peremptory challenges. "[T]he very availability of peremptories allows counsel to ascertain the possibility of bias through probing questions on the voir dire and facilitates the exercise of challenges for cause by removing the fear of incurring a juror's hostility through examination and challenge for cause." *Swain*, 380 U.S. at 219–20. "Blackstone was acutely aware of this dynamic, observing that ... 'perhaps the

bare questioning [a venire member's] indifference may sometimes provoke a resentment; to prevent all ill consequences from which, the prisoner is still at liberty, if he pleases, peremptorily to set [the venire member] aside.'" *United States v. Annigoni*, 96 F.3d 1132, 1138 (9th Cir. 1996) (en banc) (quoting 4 BLACKSTONE, COMMENTARIES 353 (1st ed. 1769)), *overruled on other grounds by Rivera v. Illinois*, 556 U.S. 148 (2009).

Counsel may of course choose to forego inquiry into racial bias for strategic reasons. But that does not render voir dire unavailable as a tool for protecting the right to an impartial jury. *Warger*, 135 S. Ct. at 524, 529 (during voir dire, defense counsel did not ask whether any juror had past experience with car accidents; voir dire was nonetheless an effective safeguard against juror bias based on such past experience); *cf. Turner*, 476 U.S. at 37 ("[A] defendant cannot complain of a judge's failure to question the venire on racial prejudice unless the defendant has specifically requested such an inquiry."). As Petitioner acknowledges, "jurors generally possess the 'intelligence, experience, [and] moral integrity' to serve fairly." Pet. Br. 45 (quoting *Batson v. Kentucky*, 476 U.S. 79, 104–05 (1986) (Marshall, J., concurring)). "Surely ... jurors today are not so bigoted, and the system not so fragile," *id.*, that courts and attorneys must fear careful voir dire on questions of racial prejudice.

3. ***Availability***. Petitioner argues that, due to "judicial control" of voir dire, criminal defendants will not always be allowed to inquire into racial bias in every jurisdiction. Pet. Br. 24–25. But in Colorado the

right of parties themselves to ask questions during voir dire is protected by the state rules of procedure, Colo. R. Crim. P 24(a)(3), and Colorado courts have long held that the right to voir dire on racial prejudice is "undisputed." *Maes v. District Court*, 503 P.2d 621, 624–25 (Colo. 1972). Here, the trial judge was surprised that defense counsel had not asked questions on the topic, remarking that "those questions are always asked." J.A. 131–32. Petitioner cannot plausibly claim that Colorado litigants are "foreclosed entirely" from exploring racial bias in voir dire, Pet. Br. 25, when he made no attempt to do so. In *Tanner* and *Warger*, this Court assessed the constitutionality of Federal Rule 606(b) against the trial processes available in federal courts. The constitutionality of Colorado's rule should similarly be assessed against the trial processes available to *Colorado* defendants—and, indeed, to Petitioner in this very case.

Colorado aside, Petitioner's argument about the availability of voir dire on race may present theoretical concerns in some jurisdictions. But this Court has long said that federal trial courts should grant voir dire on racial bias if requested. *Rosales-Lopez*, 451 U.S. at 191 n.7 (plurality opinion); *Ristaino*, 424 U.S. at 597 n.9; *Aldridge v. United States*, 283 U.S. 308, 313–14 (1931). Consistent with that guidance, federal judges across the country routinely conduct voir dire on racial bias. *See, e.g.*, *Brewer*, 119 F.3d at 995–96 (the trial court insisted that defense counsel check with his client about whether to conduct voir dire on racial bias; the ensuing examination led to one juror being excused).

B. The other *Tanner* safeguards likewise protect against racial bias.

In addition to voir dire, this Court has identified three other "aspects of the trial process" that protect "Sixth Amendment interests," *Tanner*, 483 U.S. at 127, and specifically ensure "juror impartiality," *Warger*, 135 S. Ct. at 529. While Petitioner dismisses these safeguards as well, state and federal case law demonstrates that each safeguard has historically been effective in protecting against racial bias.

1. ***Pre-Verdict Juror Reports***. "[J]urors are observable by each other, and may report inappropriate juror behavior to the court *before* they render a verdict." *Tanner*, 483 U.S. at 127 Court decisions demonstrate that jurors are, in fact, willing to come forward when other jurors express racial bias.[10]

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[10] *See, e.g.*, *United States v. Muhammad*, 336 Fed. App'x 188, 190–91 (3d Cir. 2009) (unpublished) (mid-trial, a juror reported another juror's racial comments; the court dismissed both the biased juror and another juror who had been opposed to reporting); *United States v. McClinton*, 135 F.3d 1178, 1184–85 (7th Cir. 1998) (mid-trial, a juror reported two other jurors' apparent racial comments; the judge conducted a mid-trial voir dire of every juror and dismissed one); *United States v. Caporale*, 806 F.2d 1487, 1504 & n.21 (11th Cir. 1986) (a juror sent a note to the judge expressing concern that other jurors were racially biased); *United States v. Heller*, 785 F.2d 1524, 1525–29 (11th Cir. 1986) (during deliberations, the foreperson sent the judge a note regarding biased statements; the trial judge performed voir dire of each juror, revealing pervasive anti-Semitism; the appeals court remanded for retrial because the voir dire was "superficial at best"); *Tavares v. Holbrook*, 779 F.2d 1, 1–3 (1st Cir. 1985) (Breyer, J.) (during deliberations, an alternate juror reported a potentially racial statement; the trial court questioned each juror individually and

Citing none of these decisions, Petitioner claims that "[t]he possibility that jurors may report racially biased remarks ... is remote at best." Pet. Br. 22. He asserts that jurors will seek to avoid "unwanted conflict," will be subject to "strong group pressures," and will refuse to report racial bias through a foreperson. *Id.* at 23–24 & n.6. The cases on juror reporting refute these arguments. So do other cases demonstrating jurors' willingness to confront and challenge racial remarks in the jury room. *E.g.*, *United States v. Benally*, 546 F.3d 1230, 1231–32 (10th Cir. 2008) (noting that a juror "argued with the foreman" about racial remarks, "going back and forth several times"); *McCowen*, 939 N.E.2d at 762 (describing a heated confrontation between jurors regarding racial

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denied a mistrial); *McFarland v. Hill*, No. C13-00147 EJD (PR), 2014 WL 3867261, at *3 (N.D. Cal. Aug. 5, 2014) (during deliberations, a juror sent a note to the court regarding another juror's racial comments; the court responded by giving jurors additional instructions); *Li v. Artuz*, No. 01CIV4530 LTS MHD., 2002 WL 48323, at *1 (S.D.N.Y. Jan. 11, 2002) (the court received a note from a juror complaining that another juror had made a potentially racist remark; the court inquired and determined that deliberations could continue); *People v. Weatherwax*, No. E030347, 2006 WL 2838496, *4 (Cal. App. Oct. 5, 2006) (unpublished) (a foreperson's report to the court that a juror was refusing to deliberate prompted an inquiry into possible juror racial bias); *Pham v. State*, 70 So. 3d 485, 492–93 (Fla. 2011) (an alternate juror wrote a mid-trial letter to the court stating that she had heard jurors making statements about the Vietnamese defendant; the court questioned the jurors, whose statements were found not to rise to the level of ethnic bias); *State v. McDowell*, No. COA05-424, 179 N.C. App. 436, at **3–5 (Sept. 5, 2006) (unpublished) (before closing arguments, a juror told the bailiff that another juror had made a racial comment; the judge conducted voir dire on that issue).

comments). Here, the jury did not avoid unwanted conflict. Deliberations lasted a day and a half and included times during which the jury "got very loud for a while." J.A. 69.

Petitioner also claims, in spite of the case law, that "jurors may not realize that racially biased statements ... are legally impermissible." Pet. Br. 22. That is unlikely to be true of most jurors, given that, as Petitioner acknowledges, racial bias is "generally met with social condemnation." *Id.* at 27 If necessary, an instruction can clarify the matter. Here, for example, a stock instruction stated, "You are instructed not to allow gender bias or any kind of prejudice based upon gender to influence your decision." J.A. 57. Similar instructions can be used to address racial bias. *See* Jud. Council of Cal. Crim. Jury Instructions, No. 200 (2016); *Okla. Unif. Jury Instructions for Juvenile Cases*, 2005 OK 12, ¶ 6, 116 P.3d 119, 123 (Okla. 2005). Petitioner could have requested the court give such an instruction here—as other Colorado courts have done—but did not. *Harlan*, 8 P.3d at 500 ("[T]he trial court instructed the jury that it 'must not consider the race, gender or personal appearance of [the defendant].'").

2. ***Nonjuror Evidence***. "[T]he potential use of 'nonjuror evidence'" may also safeguard a defendant's right to an impartial jury. *Warger*, 135 S. Ct. at 529. Petitioner claims that nonjuror evidence of "racially prejudiced statements *during* deliberations rarely exists," Pet. Br. 27 (emphasis added), but this overlooks the potential for racial bias to be expressed *outside the jury room*. For example, in one case the prosecutor informed the court that a person had overheard a juror making racial remarks about the defendant at a bar.

After investigating the allegations, the judge dismissed the juror. *Escobedo v. Lund*, 948 F. Supp. 2d 951, 960–61 (N.D. Iowa 2013). In another, the court granted a new trial when a probation officer reported that a probationer in an unrelated case overheard a juror's racial comments made one evening at a club. *United States v. Fuentes*, No. 2:12-CR-50-DBH, 2013 WL 4401803, at **2–3, 9 (D. Me. Aug. 15, 2013). Other cases tell similar stories. *See United States v. McDuffie*, 24 Fed. App'x 167, 173 (4th Cir. 2001) (unpublished) (a departing juror made a potentially racial remark to prosecutors about the O.J. Simpson case); *Cooke v. State*, 97 A.3d 513, 548 (Del. 2014) (a potential juror's neighbor reported racial comments the potential juror had made in reference to the case); *People v. Du Pree*, 363 N.E.2d 910, 912 (Ill. App. 1977) (friends of the defendant reported racial comments made by jurors in a court restroom).

The modern phenomenon of social media has created an additional opportunity for litigants to discover evidence of a juror's potential bias. *Cf. United States v. Liu*, 69 F Supp. 3d 374, 381 (S.D.N.Y. 2014) (after a verdict was rendered in an immigration fraud case, a juror Tweeted, "[T]hese people prey on the fear and relative ignorance of applicants. It's horrible."); *W.G.M. v. State*, 140 So. 3d 491, 495 (Ala. Crim. App. 2013) (the defendant discovered that jurors had a "social media network relationship" with employees of the district attorney's office); *State v. Webster*, 865 N.W.2d 223, 239 (Iowa 2015) (during trial, a juror "liked" a Facebook comment by the victim's stepmother that stated, "[g]ive me strength"). Use of social media for this purpose is becoming more common. The American Bar Association issued a formal opinion

explaining that "a lawyer may review a juror's or potential juror's Internet presence" and "must take reasonable remedial measures" if the lawyer "discovers evidence of ... misconduct." ABA Comm. on Prof'l Ethics & Prof'l Responsibility, Formal Op. 466 (2014).

3. ***Observation During Trial***. Finally, "the observations of court and counsel during trial" can protect against juror bias. *Warger*, 135 S. Ct. at 529. Court personnel interact with jurors constantly: they escort jurors to and from the jury room, give the jurors suggestions about places to eat near the courthouse, and bring the jurors lunches on days the jury is deliberating. All of these interactions present opportunities for court personnel to observe juror behavior, including expressions of possible bias. *United States v. Patterson*, No. 04CR705–1, 2007 WL 1438658, at **4–5 (N.D. Ill. May 15, 2007) (a juror had described observers in the gallery as "unsavory people" to a court security officer, prompting the court and defense counsel to conduct a mid-trial inquiry into possible juror racial bias); *State v. Johnson*, 630 N.W.2d 79, 80 (S.D. 2001) (a prosecutor learned that, on a recess during voir dire, two of the prospective jurors had been overheard making racial comments). The likelihood of attorneys and courtroom personnel learning about possible racial bias is at least as great as the likelihood of their learning about the sort of bias examined in *Warger*. And *Warger* held that "juror impartiality is adequately assured by the parties' ability to bring to the court's attention any evidence of bias before the verdict is rendered." 135 S. Ct. at 529.

C. Beyond the *Tanner* safeguards, other protections of the jury system counteract the potential for biased juries.

Tanner and *Warger* cited four safeguards against juror misconduct and impartiality, concluding that those alone are sufficient to obviate the need for an exception to the no-impeachment rule. But the Court did not hold that the list was exclusive. Three other structural protections of the jury system—some mandated by the Sixth Amendment itself—help to minimize the potential for jury bias, including bias based on race, ethnicity, or nationality. All three of those protections were honored in this case.

1. ***Fair Cross-Section of the Community***. The Sixth Amendment demands, as part of "the American concept of the jury trial," that state and federal juries be drawn from a "fair cross section of the community." *Taylor v. Louisiana*, 419 U.S. 522, 527 (1975). This means that "the jury wheels ... from which juries are drawn must not systematically exclude distinctive groups in the community and thereby fail to be reasonably representative thereof." *Id.* at 538. The fair-cross-section requirement accomplishes two ends related to jury impartiality, both of which serve to counteract potential racial bias.

First, the requirement signals to the public, and to jurors in particular, that juries are "not the organ of any special group or class." *Id.* at 527 (quoting *Glasser v. United States*, 315 U.S. 60, 85–86 (1942)). "Community participation in the administration of the criminal law ... is not only consistent with our democratic heritage but is also critical to public

confidence in the fairness of the criminal justice system." *Id.* at 530.

Second, the "broad representative character of the jury" is an "assurance of a diffused impartiality " *Id.* (quoting *Thiel v. S. Pac. Co.*, 328 U.S. 217, 227 (1946) (Frankfurter, J., dissenting)). This is not because the Court "assume[s] that the excluded group will consistently vote as a class"; rather, it is because full and fair deliberation is enhanced by diversity of "qualities of human nature and varieties of human experience." *Id.* at 532 n.12 (quoting *Peters v. Kiff*, 407 U.S. 493, 502–04 (1972) (plurality opinion)). "[A] jury constituted of individuals with diverse perspectives, coming from the various classes of society, is greater than the sum of its respective parts .... In short, it is believed that diversity begets impartiality." *State v. LeMere*, 2 P.3d 204, 212 (Mont. 2000); *see also Hennepin Cnty. v. Perry*, 561 N.W.2d 889, 899 (Minn. 1997) ("The goal of jury impartiality is best achieved through the widest possible range of views and experiences."). Studies confirm that diverse groups deliberate longer and consider a wider range of information than homogeneous groups. *See* Samuel R. Sommers, *On Racial Diversity and Group Decision Making: Identifying Multiple Effects of Racial Composition on Jury Deliberations*, 90 J. PERSONALITY & SOC. PSYCHOL. 597, 606–10 (2006).

Colorado guards this fair-cross-section right, and thus the concomitant right to an impartial jury, meticulously. In 2008, the state supreme court decided a case involving the local jurisdiction at issue here, Arapahoe County, Colorado. *Washington v. People*, 186 P.3d 594 (Colo. 2008). Under review was a jury

selection practice that resulted in statistically significant, but "minimal" effects on diversity: "in every three 90- to 100-person jury panels" (that is, in every 270 to 300 selections for jury service) the practice reduced by "less than one" the number of African American and Hispanic jurors. *Id.* at 597. This slight disparity of only 0.3 percent did not violate the Sixth Amendment—the participation of those two groups on jury panels matched almost precisely their percentage of the county's overall population. *Id.* at 598–99, 606. Even so, the court "disapprove[d] of [the selection practice] and direct[ed] that it be stopped immediately." *Id.* at 596.

There is no claim here that the jury, selected from a sixty-one-person venire, departed from the fair-cross-section requirement.

2. ***Batson v. Kentucky***. Although based on equal protection rather than the Sixth Amendment, the prohibition against discriminatory use of peremptory strikes—by either the prosecutor or the defendant—complements the fair-cross-section requirement. It assures that voir dire serves the function for which it was designed; that is, it ensures jurors are selected based on their "ability impartially to consider evidence presented at a trial." *Batson*, 476 U.S. at 87 It also emphasizes to prospective jurors that courts are governed by equal justice under the law. "In view of the heterogeneous population of our Nation, public respect for our criminal justice system and the rule of law will be strengthened if we ensure that no citizen is disqualified from jury service because of his race." *Id.* at 99; *accord Powers v. Ohio*, 499 U.S. 400, 407 (1991) ("Jury service preserves the democratic

element of the law, as it ... ensures continued acceptance of the laws by all of the people."). Here, there is no dispute that the *Batson* rule and the vital interests it serves were fully honored. J.A. 36 (confirming that neither party had a *Batson* claim).

3. ***Jury Size and Unanimity***. Finally, jury size, together with the requirement that verdicts be unanimous in criminal cases, enhances the deliberative process and counteracts potential juror bias.

Colorado, like the federal government and the vast majority of States, grants felony defendants the right to a jury of twelve. COLO. REV. STAT. § 18-1-406 (2015); 6 LAFAVE, CRIMINAL PROCEDURE, at § 22.1(d), p. 22. This number of jurors—double the Sixth Amendment's minimum—promotes effective group deliberation and thus "counterbalanc[es] various biases." *Ballew v. Georgia*, 435 U.S. 223, 233–34, 236–37 (1978) (plurality opinion). "Larger juries deliberate longer, and ... are more likely to produce accurate results ... [and] return verdicts in accord with community values." 6 LAFAVE, CRIMINAL PROCEDURE, at § 22.1(d), p. 20 (quoting ABA Principles for Jury Trials, Principle 3 and Comment (2006)); *accord id.* at § 22.1(d), p. 20 n.83 (collecting sources).

The deliberative value of large juries is further enhanced by jury unanimity—required in Colorado and, again, in the vast majority of States. "Most states consider unanimity to be an essential attribute of the right to jury trial. ... [Unanimity] ensure[s] careful assessment of the evidence by the jury, enable[s] minority viewpoints to be heard and considered, and reinforce[s] the requirement of proof beyond a reasonable doubt." *Id.* at § 22.1(c), p. 25; *see also id.* at

§ 22.1(d), p. 20 & n.85 (noting that larger juries fail to reach unanimity more often because they are more likely to include more than one dissenting juror); *accord* HARRY KALVEN JR. & HANS ZEISEL, THE AMERICAN JURY, 462–63 (1966).

Thus, even when a juror expresses racial bias, the requirement that a twelve-person jury reach a unanimous decision guards against a verdict contrary to "the evidence and the law." *Benally*, 546 F.3d at 1241 (finding it significant that a juror who objected to racial comments joined the verdict). Here, the twelve-person jury deliberated for nearly a day and half, reaching unanimity on three counts for which the evidence was compelling.[11] It did not reach unanimity on the sole felony count for which, based on the testimony of the victim herself, the evidence was less conclusive. This confirms that the jury carefully weighed the evidence for each count. *United States v. Shalhout*, 507 Fed. App'x 201, 207 (3d Cir. 2012) (unpublished) (holding that a jury's partial acquittals "support the conclusion that the jury was not racially biased"); *cf. Skilling v. United States*, 561 U.S. 358, 384 (2010) ("The jury's ability to discern a failure of proof of

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[11] Petitioner asserts that the evidence in this case was "questionable." Pet. Br. 45. He does not directly explain why; instead, he implies that the evidence was deficient by mirroring defense counsel's closing argument at trial. *Compare* Pet. Br. 6 *with* R. Tr. 49–65 (Feb. 25, 2010). That characterization of the case was rejected by a unanimous jury. And, in any event, "this case had little to distinguish it from many other cases." *Shillcutt v. Gagnon*, 827 F.2d 1155, 1159 (7th Cir. 1987). "It required the jury to make a basic credibility choice," *id.*, here, between the three victims, their father, and three sheriff's deputies, on the one hand, and a single alibi witness, on the other.

guilt of some of the alleged crimes indicates a fair minded consideration of the issues ...." (parenthetically quoting *United States v. Arzola-Amaya*, 867 F.2d 1504, 1514 (5th Cir. 1989)). The district court below polled the jury and "each juror orally affirmed that these were their individual verdicts." J.A. 85. Based on the record, Colorado's jury size and unanimity requirements served their important functions in this case.

II. Petitioner's proposed constitutional exception to no-impeachment rules will undermine vital interests of the jury system and upset various jurisdictions' careful balancing of these interests.

In the context of a jury system that includes the safeguards against juror bias described above, this Court has consistently refused to create exceptions to no-impeachment rules. "[T]he right to jury trial in criminal cases [is] fundamental to our system of justice." *Duncan v. Louisiana*, 391 U.S. 145, 153 (1968). And, as the Court has held, no-impeachment rules serve "long-recognized and very substantial concerns [that] support the protection of jury deliberations from intrusive inquiry." *Tanner*, 483 U.S. at 127; *see also Warger*, 135 S. Ct. at 529; *McDonald*, 238 U.S. at 267–68. Those concerns apply here.

First, the various interests that no-impeachment rules serve—full and frank discussion, verdict finality, preventing juror harassment, preserving public confidence in juries, and jury independence—do not lose their force based on the type of juror bias at issue. They apply here just as they did in *Tanner* and *Warger*. Second, each jurisdiction must strike a balance among the different policy considerations that animate no-

impeachment rules. Petitioner's requested mandatory exception will upset this balance and preclude jurisdictions from uniformly applying their no-impeachment rules to avoid disparate outcomes across cases.

A. The weighty justifications for the rule remain valid in the context of racial bias.

Petitioner's proposal to mandate a constitutional exception to Rule 606(b)—like previous proposed, but rejected, exceptions—would undermine "long-recognized and very substantial concerns" in favor of jury secrecy. *Tanner*, 483 U.S. at 127; *see also Warger*, 135 S. Ct. at 528 (rejecting the petitioner's "particular exception to the Rule" because it "would represent a threat to both jurors and finality in those circumstances not covered by the Rule's express exceptions"); *McDonald*, 238 U.S. at 267–68.

Petitioner asserts that "[t]he policy rationales underlying Rule 606(b) are insufficient to outweigh a defendant's constitutional right to present evidence that a juror infected deliberations with racial bias." Pet. Br. 33. But, at base, this argument "assert[s] that [the] concerns [underlying the no-impeachment rule] were misplaced." *Warger*, 135 S. Ct. at 528. The Court has rejected that argument. *Id.*

1. ***Full and Frank Discussion***. In *Tanner*, this Court recognized the long-standing concern that post-verdict inquiry about what was said in deliberations threatens "full and frank discussion in the jury room." 483 U.S. at 119–21. "It is essential that jurors express themselves candidly and vigorously as they discuss the evidence presented in court. The prospect that their

words could be subjected to judicial critique and public cross examination would surely give jurors pause before they speak." *Benally*, 546 F.3d at 1234. Petitioner's two arguments to the contrary have been rejected by this Court.

In his first argument, Petitioner asserts that there "is no valid interest in creating breathing space for jurors to argue that a defendant should be convicted because of her race." Pet. Br. 34–35. That misses the broader purpose of Rule 606(b). Allowing examination of jurors' internal thought processes will inhibit not just discussion of improper topics but also the "fruitful exchange of ideas and impressions" regarding *all* topics. *Shillcutt v. Gagnon*, 827 F.2d 1155, 1159 (7th Cir. 1987) (explaining the importance of full and frank discussion in a case involving allegations of a juror's racial bias); *see also Benally*, 546 F.3d at 1234 ("[T]he rule protects the deliberative process in a broader sense."). In *McDonald*, for example, the Court could have adopted a quotient-verdict exception to the no-impeachment rule without "undermin[ing] any legally acceptable discussion in the jury room." Pet. Br. 34. Yet the Court refused to begin carving judicial exceptions from the rule, fearing that doing so would lead to "the destruction of all frankness and freedom of discussion." *McDonald*, 238 U.S. at 268.[12] Likewise in *Tanner* The

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[12] Petitioner claims that in *Clark v. United States*, 289 U.S. 1 (1933), this Court recognized the need to "stifle" "freedom of debate" in some situations. Pet Br. 34 (quoting *Clark*, 289 U.S. at 13). But *Clark* is inapposite; it involved not impeachment of a verdict but prosecution of a juror for criminal contempt. This is why, two years ago in *Warger*, the Court rejected Petitioner's argument as a misreading of *Clark*: "[N]othing in [*Clark*] was 'at

Court was not concerned about chilling discussion about jurors' drug and alcohol use during trial or chilling the misconduct itself. The fear instead was that the increased potential for "a barrage of postverdict scrutiny" would undermine "full and frank discussion in the jury room." 483 U.S. at 120–21.

One court has suggested that it is better for racial bias to remain "a silent factor with a particular juror" than to have the juror reveal his or her thinking. *Powell v. Allstate Ins. Co.*, 652 So. 2d 354, 357–58 (Fla. 1995). But silent bias can be even more damaging than expressed bias. Silent bias cannot be confronted, nor can it be reported to the court before deliberations end. Expressed bias can. And, contrary to Petitioner's assertion that racial comments will "infect" deliberations, *see, e.g.* Pet. Br. 17, 21, when confronted with racial statements, jurors typically respond by ensuring that their own reasoning is untainted by prejudice. Sommers & Ellsworth, 7 PSYCHOL., PUB. POL'Y, & L. at 209; *see also* Samuel L. Sommers & Phoebe C. Ellsworth, *The Jury and Race: How Much Do We Really Know About Race and Juries? A Review of Social Science Theory and Research*, 78 CHI.-KENT L. REV. 997, 1013–14, 1027 (2003). In *Benally*, for example, a juror was able to "counter[ ]" racial bias precisely because it was expressed. *Benally*, 546 F.3d at 1241. It is reasonable—and constitutional—for jurisdictions like Colorado to believe that, if an

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variance with the rule ... that the testimony of a juror is not admissible for the impeachment of his verdict.' This was because ... 'the rule against impeachment [was] wholly unrelated to the problem ... before us [in *Clark*].'" *Warger*, 135 S. Ct. at 527 (quoting *Clark*, 289 U.S. at 18).

exception to the no-impeachment rule would drive racism underground so that it becomes a "silent factor" in deliberations, *Powell*, 652 So.2d at 357–58, the exception may do more harm than good.

Petitioner's second argument is that because jurors are free to voluntarily disclose anything said in deliberations, the effect of his proposed exception would be "negligible." Pet. Br. 35–36. The Court has rejected this argument. *Warger*, 135 S. Ct. at 528 ("[Petitioner] observes that jurors remain free to ... disclose what happened in the jury room .... [He] cannot escape the scope of the Rule Congress adopted simply by asserting that its concerns were misplaced."). Voluntary disclosure occurs on jurors' own terms, and any juror may decline to speak to counsel or the press. *See* J.A. 85–86 (instructing jurors that "whether you talk to anyone is entirely your own decision" and "you may tell them as much or as little as you like"). The prospect of being subpoenaed to face examination and cross-examination presents an entirely different set of concerns regarding jurors' willingness to fully, fairly, and vigorously discuss and debate the evidence and the issues.

2. ***Finality***. "Allegations of juror misconduct, incompetency, or inattentiveness, raised for the first time days, weeks, or months after the verdict, seriously disrupt the finality of the process." *Tanner*, 483 U.S. at 120. Petitioner contends that this finality interest is not compelling because his proposed exception to the no-impeachment rule will disturb few verdicts. He relies on an amicus brief filed in his favor, whose authors located only two dozen court decisions that have required new trials. Pet. Br. 39.

Finality, however, is disrupted not only when a court actually disturbs a verdict but also when it allows inquiry into the verdict's validity. Here, the verdict was handed down in February, but Juror H.C. was not called to testify until August and the trial court's final order was not handed down until the last day of September More than seven months—216 days—elapsed between the verdict and the resolution of Petitioner's challenge to it. Sentencing was delayed during that entire seven months. *See* J.A. 102–03. Another example is *United States v. Villar*. After a remand from the First Circuit, the district court "held an evidentiary hearing [on the defendant's motion to set aside the verdict for racial bias], interviewed all the jurors, made detailed factual findings (including credibility determinations), and concluded, based on these findings, that the jurors were not biased." 411 Fed. App'x 342, 342 (1st Cir. 2011). Defendant filed a second appeal, in which the First Circuit "summarily affirm[ed] validation of the judgment of conviction." *Id.* The entire process lasted three and a half years from the time defendant's motion was first filed.

A separate problem with Petitioner's argument is that there is no way to gauge the accuracy of his statistics. The amicus brief relies almost entirely on reported and published appellate court decisions. *See* Appendices to Ctr. on Admin. of Crim. Law Amicus Br. 1a–8a. But many of the States that follow Petitioner's proposed rule severely restrict, or prohibit entirely, the prosecution from appealing orders granting new

trials.[13] Even in States that authorize such appeals, the prosecution would be unlikely to appeal every order granting a new trial, and the defense may not appeal the denial of a new trial motion in every case. And where an appeal was filed, the resulting opinion may not be reported in Westlaw, the only source Petitioner's amicus relies on. There is little chance that Petitioner's sample is representative of the relevant universe of cases.

Petitioner's assurance that his rule will have minimal effect on verdict finality is dubious for other reasons. A ruling by this Court in Petitioner's favor would extend to both criminal and civil actions. *See Warger*, 135 S. Ct. at 528 ("The Constitution guarantees both criminal and civil litigants a right to an impartial jury."). And ruling for Petitioner here would require unsettling verdicts based on a wide variety of alleged biases, given that an exception limited to racial bias would be untenable. *See* Pet. Br. 43–44; *infra*, pp. 54–56 & n. 15. Further, litigants will no doubt argue, perhaps successfully, that fairness requires additional exceptions to the no-impeachment rule. *Infra*, pp. 54–56. "[L]et it once be established that verdicts solemnly made and publicly returned into

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[13] *See State v. Morrissette*, 830 A.2d 704, 705–06, 710 (Conn. 2003) (construing CONN. GEN. STAT. § 52-263); *State v. Johnson*, 450 S.W.3d 457, 459–60 (Mo. Ct. App. 2014) (construing MO. REV. STAT. § 547.200); *see also* KAN. STAT. ANN. § 22-3602(b) (2016) (authorizing appeals of orders granting new trials only for certain crimes); MINN. R. CRIM. P. 28.04, subd. 1(7) (prosecution may appeal from an order for a new trial only if district court "expressly stated" that its order was "based ... exclusively on a question of law that ... is so important or doubtful that the appellate courts should decide it").

court can be attacked and set aside on the testimony of those who took part in their publication and all verdicts could be, and many would be, followed by an inquiry in the hope of discovering something which might invalidate the finding." *McDonald*, 238 U.S. at 267

3. ***Harassment of Jurors***. The federal version of Rule 606(b) was adopted in part because a weaker rule "would permit the harassment of former jurors by losing parties as well as the possible exploitation of disgruntled or otherwise badly-motivated ex-jurors." *Tanner*, 483 U.S. at 124 (quoting S. Rep. No. 93-1277, pp. 13–14 (1974)). The Colorado Supreme Court expressed similar concerns below, reasoning that to adopt Petitioner's exception would "incentivize post-verdict harassment of jurors." Pet. App. 15a.

Petitioner argues that his exception to the no-impeachment rule would not cause jurors to be harassed by counsel, because States have rules of professional conduct to regulate attorney behavior. Pet. Br. 37–38. *Warger* rejected that very argument, 135 S. Ct. at 528, and for good reason. Attorneys have significant incentive to push the boundaries of these ethical rules. *Tanner*, 483 U.S. at 126 ("[One] juror affidavit ... was obtained in clear violation of the District Court's order and the court's local rule against juror interviews ...."). And the concern lies not just in what a judge or disciplinary board might deem to violate ethical rules but also in lesser ways in which lawyers and courts, after verdicts are rendered, pursue jurors for information. "A juror who reluctantly joined a verdict is likely to be sympathetic to overtures by the loser, and persuadable to the view that his own consent rested on false or impermissible considerations, and

the truth will be hard to know." 3 MUELLER & KIRKPATRICK, FEDERAL EVIDENCE, § 6:16, p. 75 (4th ed. 2013); *accord United States v. Villar*, 586 F.3d 76, 88 (1st Cir. 2009) ("[J]ury verdicts could be easily undermined by post-judgment comments ... coaxed from jurors with second thoughts.").

The post-verdict inquiry itself is a burden on jurors, who may be called for hearings at which they are examined and cross-examined, regardless of which juror made an allegedly biased statement. *E.g.*, *Villar*, 411 Fed. App'x at 342. This is particularly burdensome when, as is often the case, the inquiry takes place long after a verdict is handed down. *See id.*; *see also* J.A. 114 (noting that one juror "is relocating soon to Texas"). "Such potential for post verdict interference is hardly calculated to encourage the public to accept jury service." 3 MARK S. BRODIN ET AL., WEINSTEIN'S FEDERAL EVIDENCE § 606App.01[3], p. 606App.-6 (2d ed. 2015) (quoting 120 CONG. REC. H550–51 (daily ed. Feb. 6, 1974) (statement of Rep. Wiggins)).

4. ***Confidence in the Jury System***. The Colorado Supreme Court expressed concern that inquiring into internal juror deliberations would compromise "public confidence in the fundamental notion of trial by jury." Pet. App. 13a (citing *Tanner*, 483 U.S. at 120). This fear is not unfounded. Denying an inquiry into the verdict in *Tanner* but allowing it here would appear to treat defendants unequally despite compelling reasons not to. *Benally*, 546 F.3d at 1241. And the alternative—granting an exception to Rule 606(b) for any jury misconduct or bias deemed "serious" enough to warrant one, Pet. App. 15a—would mean that the jury would no longer be an independent body in the

eyes of the law or in the eyes of observers. *Benally*, 546 F.3d at 1233.

5. ***Jury Independence***. Finally, the no-impeachment rule ensures that verdicts are the products of lay juries and not of professional judges. "If courts were permitted to retry [jury] verdicts, the result would be that every jury verdict would either become the court's verdict or would be permitted to stand only by the court's leave. This would destroy the effectiveness of the jury process which substantial justice demands and the constitution guarantees." *United States v. D'Angelo*, 598 F.2d 1002, 1005 (5th Cir. 1979); *accord Benally*, 546 F.3d at 1233.

The no-impeachment rule has always fostered the jury's independence. In the century before America's founding, if an English judge disagreed with a verdict, he could refuse to accept it, probe the jurors' rationale, give them further instruction, and have them redeliberate to arrive at the judge's preferred outcome. JOHN H. LANGBEIN, THE ORIGINS OF ADVERSARY CRIMINAL TRIAL 326–29 (Oxford Univ. Press 2010). Americans, in contrast, saw an independent jury "as a basic guarantor of individual freedom," LEONARD W LEVY, THE PALLADIUM OF JUSTICE: ORIGINS OF TRIAL BY JURY 85 (1999), and the "very palladium of free government." THE FEDERALIST NO. 83 (Alexander Hamilton). Given the American understanding of the proper relationship between judge and jury, it is unsurprising that Lord Mansfield's 1785 no-impeachment rule gained "near-universal" acceptance in the United States. *Tanner*, 483 U.S. at 117. Without a strong no-impeachment rule, "[t]he triers themselves would be tried at the behest of the verdict loser." 3

MUELLER & KIRKPATRICK, FEDERAL EVIDENCE, at § 6:16, p. 75.

Petitioner asserts that racial bias "converts the jury itself into an instrument of oppression." Pet. Br 18. That could be said of many forms of juror misconduct that fall within the scope of the no-impeachment rule. *See, e.g.*, 3 MUELLER & KIRKPATRICK, FEDERAL EVIDENCE, at § 6:17, p. 79 (noting that the rule bars "proof that one or more jurors held it against the accused that he [invoked his right not to testify]"). Even so, no-impeachment rules remain committed to the fundamental principle of jury independence. "[T]he very purpose behind Rule 606(b) is to preserve one of the most basic and critical precepts of the American justice system: the integrity of the jury." *United States v. Logan*, 250 F.3d 350, 379–80 (6th Cir. 2001); *see also* 27 WRIGHT & GOLD, FEDERAL PRACTICE & PROCEDURE § 6072, pp. 464–65 (2d ed. 2007). Allowing inquiry into jurors' internal thoughts and feelings, even in cases of alleged racial bias, would undermine juror independence and could alter jurors' commitment to full and fair deliberation—including their willingness to confront or report expressions of bias in the jury room. *Benally*, 546 F.3d at 1234 ("Had she known that the judge would review the jury's reasoning process, ... Juror K.C. might not have argued so persistently with the foreman [about his racial comments].").

Petitioner also argues that "every state, as well as federal law" recognizes exceptions to the no-impeachment rule in "various circumstances." Pet. Br 30. Those "various circumstances" involve objectively observable, extraneous influences that do not reveal the jury's internal discussions. *See id.*; 1 MCCORMICK

ON EVIDENCE § 68 (7th ed. 2013). Tolerating those limited inquiries does not suggest that further exceptions—particularly ones aimed at jurors' internal deliberations and thought processes—would do no harm. *See Warger*, 135 S. Ct. at 528. This Court has rejected the suggestion that by admitting narrow exceptions to no-impeachment rules, States abandon their interest in preventing *other* post-verdict inquiries. *Id.* at 530 (rejecting an argument that would have allowed the narrow "'extraneous' information exception [to] swallow much of the rest of Rule 606(b)").

B. This Court should not mandate an exception to no-impeachment rules that would upset States' policy decisions and produce arbitrary outcomes across cases.

The approaches to the no-impeachment rule taken by different States—including Colorado—embody varied but constitutional policy choices. Petitioner identifies jurisdictions that admit juror testimony regarding racial bias "irrespective of any Sixth Amendment imperative." Pet. Br. 30–31.[14] Most of

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[14] The Oklahoma case Petitioner cites, Pet. Br. 31 n.8, is inapposite. It involved not statements a juror made during deliberations, but statements a juror made in a bar after a verdict was rendered. *Fields v. Saunders*, 278 P.3d 577, 581 (Okla. 2012) ("[T]his is a fact specific case of juror bias and not a case of a juror impeaching a verdict.").

Further, although Petitioner claims that the "[t]he Model Code and Uniform Rules of Evidence ... recommend allowing juror testimony to report any improper statement during deliberations," Pet. Br. 30, this is not fully accurate. The 1942 Model Code recommended this expansive approach, contrary to "the majority

those jurisdictions adhere to the "Iowa Rule," which permits the introduction of *any* verbal statement by a juror and bars testimony only as to "matter[s] resting alone in the juror's breast." *Powell*, 652 So. 2d at 357 (internal quotation marks omitted). On the question of racial bias, the approaches in these and other jurisdictions are by no means uniform. *Compare id.* (explaining that "appeals to racial bias" are always exempt from the no-impeachment rule) *with State v. Callender*, 297 N.W.2d 744, 746 (Minn. 1980) (allowing an exception to Rule 606(b) only if "substantial evidence supports the claim that racial prejudice infected the verdict").

That these jurisdictions choose to balance competing interests in a particular way does not mean that their policy choice is constitutionally required. *See Warger*, 135 S. Ct. at 527 ("Congress was undoubtedly free to prescribe a broader version of the anti-impeachment rule than we had previously applied"). This Court and Congress considered adopting the Iowa Rule but rejected it in favor of "the restrictive federal approach." *Warger*, 135 S. Ct. at 530. This was "no accident." *Id.* at 527. It was a decision made after significant debate in both houses of Congress, which weighed the various public policies in favor of each version of the rule. *Tanner*, 483 U.S. at 122–25 (recounting the history of the Court's proposal for the rule and the ensuing Congressional debate). "[T]he

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of American cases." AM. LAW INST., MODEL CODE OF EVIDENCE, Rule 301 & Comment, p. 174 (1942). Since 1974, however, the Uniform Rule has been "substantially identical" to Federal Rule 606(b). 3 MUELLER & KIRKPATRICK, FEDERAL EVIDENCE, at § 6:15, p. 63.

legislative history demonstrates with uncommon clarity that Congress specifically understood, considered, and rejected a version of Rule 606(b) that would have allowed jurors to testify on juror conduct during deliberations. ..." *Id.* at 125.

Petitioner's proposed exception would undermine the careful policy decisions that Congress and jurisdictions like Colorado have made. It would require drawing lines among different kinds of juror misconduct, contrary to the plain language of Rule 606(b). Specifically, Petitioner argues that his categorical exception to Rule 606(b) may address only racial bias, because nothing "compel[s] the judiciary to police all potential forms of bias." *Id.* at 42. But in making Rule 606(b)'s application turn on the particular form of bias a juror is alleged to have expressed in deliberations, Petitioner's approach would create disparities among defendants with other compelling Sixth Amendment claims. As the Colorado Supreme Court observed below, "we cannot discern a dividing line between different *types* of juror bias or misconduct, whereby one form of partiality would implicate a party's Sixth Amendment right while another would not." Pet. App. 14a–15a. "To draw such a line would .... require trial courts to make arbitrary judgments." *Id.* at 15a.

To illustrate, Petitioner's proposed rule would require an exception for racial bias yet allow exclusion of evidence revealing "profoundly disturbing" juror misconduct. *Tanner*, 483 U.S. at 135–36 (Marshall, J., concurring in part and dissenting in part); *see also* 3 MUELLER & KIRKPATRICK, FEDERAL EVIDENCE § 6:17, pp. 76–84 (cataloguing various juror biases and

misconduct excluded by Rule 606(b)). It would allow courts to exclude evidence that a majority of jurors drank "pitchers of beer," "liter[s] of wine," and mixed drinks over lunch, causing some to sleep through the afternoons, while four used marijuana and two used cocaine on breaks. *Tanner*, 483 U.S. at 135–36 (Marshall, J., concurring in part and dissenting in part). It would allow exclusion of evidence of jurors' "insanity, inability to understand English, and hearing impairments." *Warger*, 135 S. Ct. at 530 (citing *Tanner*, 483 U.S. at 119). It would allow exclusion of testimony that "a feckless jury decide[d] the parties' fates through a coin flip or roll of the dice." *United States v. Shiu Lung Leung*, 796 F.3d 1032, 1036 (9th Cir. 2015); *see also McDonald*, 238 U.S. at 266 (excluding evidence that jurors rendered a "quotient verdict" after "protesting jurors finally yielded"). And it would allow exclusion of testimony regarding many significant biases prejudicing jurors against one of the parties. *See Warger*, 135 S. Ct. 528–29.[15]

In all of these circumstances, important policies justify applying the no-impeachment rule, and those policies apply no less to Petitioner's proposed exception. Racial prejudice is repugnant and has no place in a

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[15] Petitioner suggests that, if the Court finds no principled way to limit its ruling to racial bias, it create a constitutional exception to Rule 606(b) for bias against any class of individuals that, in purposeful discrimination cases, would receive more than rational basis review. Pet. Br. 43–44. This approach would still entail choosing among types of juror misconduct entitled to a constitutional exception, and it would still deny relief to defendants faced with other "profoundly disturbing" jury behavior. *Tanner*, 483 U.S. at 135–36 (Marshall, J., concurring in part and dissenting in part).

courtroom, but "[i]f a jury does not follow the jury instructions, or ignores relevant evidence, or flips a coin, or falls asleep, then surely that defendant's right to a fair trial would [also] be aggrieved." *Benally*, 546 F.3d at 1241. "Indeed, it is hard to see why, under this theory, *Tanner* should not have been decided the other way." *Id.*

There are many constitutionally valid methods of balancing the policy concerns that animate no-impeachment rules. *Cf. id.* at 1238 ("Perhaps it would be a good idea to amend Rule 606(b) to allow testimony revealing racial bias in jury deliberations ...."). Colorado's version of the no-impeachment rule—like the federal version—represents an acceptable policy decision. Colorado believes that a strict rule will best serve vital interests such as full and frank discussion, finality of verdicts, and preventing juror harassment. At the same time, Colorado permits extensive voir dire, including voir dire on questions of racial bias; is strongly committed to the fair cross-section requirement for choosing jury venire members; and requires twelve jurors to arrive at a unanimous verdict. Against the backdrop of these Sixth Amendment safeguards, Colorado's decision to adhere to the carefully considered policy choices reflected in the text of Rule 606(b) does not violate the Constitution.

CONCLUSION

The opinion of the Colorado Supreme Court should be affirmed.

Respectfully submitted,

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Supreme Court of the United States

MIGUEL ANGEL PEÑA RODRIGUEZ,

Petitioner,

v.

STATE OF COLORADO,

Respondent.

On Writ of Certiorari
to the Colorado Supreme Court

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

Laced throughout the State's brief is a simple premise: that racial prejudice is no worse than other forms of bias. It would be "arbitrary," and "treat defendants unequally," the State asserts, to mandate a constitutional exception to no-impeachment rules for racial animus but not for other forms of partiality. Resp. Br. 49, 54; *see also id.* at 3-4, 18-19.

The State's premise is wrong. The Constitution—as well as our history, statutory law, morality, and common sense—teach that racial prejudice stands apart. Therefore, even if the State were correct that various safeguards diminish the odds of racial bias infecting jury deliberations as effectively as they diminish the chances of having jurors who are intoxicated or partial to a litigant due a relative's past similar experience, it would not matter. The Sixth Amendment would still require an exception for the unique contaminant of racial bias. But the reality is even more compelling: The procedural tools the State identifies are, in fact, *less* effective in protecting against racial bias than against other forms of partiality. So the constitutional imperative here is actually all the more pressing.

The State protests that a constitutional safety valve for testimony revealing that racial bias infected deliberations would "undermine vital interests of the jury system." Resp. Br. 41. But neither the State nor its amici point to any actual harm that has materialized in the numerous jurisdictions that have long had the exception at issue. Nor does the State seriously confront the reality that *all* jurisdictions, including Colorado, already have exceptions to the general rule that jurors may not impeach their own

verdicts—and, again, it is undisputed that none of the potential harms the State identifies have arisen because of those exceptions.

That leaves a plain truth: Convicting someone of a crime because of his race tramples our most vital principles of liberty and equality. It destroys the "fundamental integrity of all that is embraced in the constitutional concept of trial by jury." *Turner v. Louisiana*, 379 U.S. 466, 472 (1965). States should not be allowed to tolerate such perversions of justice.

ARGUMENT

As the State recognizes, states may not enforce evidentiary rules where the rules impose constitutional harm "disproportionate to the ends that they are asserted to promote." Resp. Br. 18 (quoting *Holmes v. South Carolina*, 547 U.S. 319, 326 (2006)). Consequently, this Court must balance the infringement here on the right to an impartial jury against the state interests purportedly served by barring juror testimony describing racial bias during deliberations. *See* Petr. Br. 15-17. That balance tips decisively in petitioner's favor.

I. Colorado's Rule Barring Juror Testimony That Racial Bias Infected Deliberations Seriously Infringes The Right To An Impartial Jury.

The State argues that the factors identified in *Tanner v. United States*, 483 U.S. 107 (1987), and certain other structural aspects of the jury system "effectively address" the problem of racial bias infecting jury deliberations. Resp. Br. 19. The State is mistaken.

A. The *Tanner* Factors

1. *Voir dire.* The State places its greatest emphasis on voir dire. According to the State, racial bias will seldom penetrate the jury room if defense counsel skillfully conducts voir dire. Resp. Br. 20-30. This suggestion, however, is flawed in multiple ways.

a. As an initial matter, the State's contentions regarding sound defense strategy are misguided. The State, in particular, derides defense counsel here for demanding nothing beyond "[o]pen-ended questions" about potential partiality "that fail[ed] even to obliquely raise racial bias." Resp. Br. 27 But to borrow the United States' words in response to an equivalent suggestion:

> [There is] no reason for presuming that the general questions asked by the court were less likely to uncover prejudice against people of Mexican ancestry than . . more specific question[s]. Indeed, it may be that the general questions asked by the court were more effective than . specific question[s] would have been. . Here, the general questions asked allowed each juror to indicate his partiality, without being called upon to explain its basis or having it inferred from the nature of the question.

Br. for United States at 8, 24, *Rosales-Lopez v. United States*, 451 U.S. 182 (1981) (No. 79-6624) (footnote and internal quotation marks omitted). In other words, in light of the discomforting nature of being asked directly about one's racial views, defense

lawyers will often sensibly conclude that it is better to ask jurors general questions regarding potential bias than more pointed ones about race.[1]

No doubt defense lawyers may sometimes reach the opposite conclusion—that, even in garden-variety prosecutions where race should not be an issue, it is still worthwhile to have prospective jurors asked about the subject during voir dire. But does the State really think that *every* public defender, in *every* prosecution across the country—whether it be for shoplifting, assault, money laundering, or drunk driving—should flag at the outset of trials that he or she believes racial bias might influence the outcome? To say this would be "insulting to jurors," Pet. App.

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[1] This case illustrates the point. The State describes this as an "interracial" crime involving "a basic credibility choice" between the victims (the only eyewitnesses) and the alibi witness. Resp. Br. 22, 40 n.11. But petitioner never suggested race was relevant, and he never argued the victims lied. Instead, petitioner maintained simply that the victims' identification—springing, as it did, from a quick and stressful interaction, followed by a suggestive show-up—was "mistaken." Petr. Br. 5-6; *see also Stovall v. Denno*, 388 U.S. 293, 302 (1967) ("The practice of showing suspects singly to persons for the purpose of identification, and not as part of a lineup, has been widely condemned."). That the victims testified they were "100% positive" petitioner was the perpetrator (Resp. Br. 6) does not undercut petitioner's decision to stick with the theme of misidentification. Research shows that expressions of certainty in situations like this do not actually correlate with increased reliability, and thus "can cause miscarriages of justice" when elicited at trial. Michael R. Leippe & Donna Eisenstadt, *Eyewitness Confidence and Confidence-Accuracy Relationship in Memory for People*, *in* 2 Handbook of Eyewitness Psychology 377, 418 (Rod C.L. Lindsay, et. al, eds., 2007).

11a n.5 (quoting *United States v. Villar*, 586 F.3d 76, 87 n.5 (1st Cir. 2009)), is putting it mildly. Moreover, to return to the United States' explanation in *Rosales-Lopez*, asking prospective jurors about their racial attitudes at the outset of a trial where there is "little to suggest that [the defendant's] race or national origin [i]s likely to play any material role in the jury's deliberations" unacceptably "runs the danger of injecting racial issues in a case where they would otherwise play no role." Br. for United States in *Rosales-Lopez* at 8, 24.

More generally, suggesting that every criminal case ought to commence with a formal dialogue regarding the importance of race hardly seems like a productive way to help the Nation move toward "a colorblind society in which race does not matter," *Fisher v. Univ. of Texas*, 133 S. Ct. 2411, 2427 (2013) (Thomas, J., concurring) (quotation marks and citation omitted). Remember that in the federal system and many others, *judges* typically conduct the actual questioning at voir dire, with counsel merely providing proposed questions. Especially under these circumstances, it is "quite conceivable that a thoroughly competent and fairminded district court judge could conclude that the asking of [questions about race], or the devotion of a substantial amount of the time to the inquiry, could well exacerbate whatever prejudice might exist without substantially aiding in exposing it." *Rosales-Lopez*, 451 U.S. at 195 (Rehnquist, J., concurring in the judgment).

In all events, recognizing a constitutional fail-safe for exceptional cases where racial bias was injected into deliberations is far better than implicitly requiring defense counsel in *all* future criminal trials

to introduce race at the outset. Defense lawyers should be able to continue to exercise their professional discretion concerning "whether or not [they] would prefer to have the inquiry into racial or ethnic prejudice pursued" at voir dire. *Rosales-Lopez*, 451 U.S. at 191 (plurality opinion). And where, as here, there is no good reason to have thought race should play any role in the outcome, defense counsel's decision not to question jurors specifically about race should be taken as entirely reasonable. *See id.*

b. Even when the defense strategically desires to probe specifically for racial bias during voir dire, the State skates over the fact that judges have "broad discretion" to prohibit such inquiries. *Ham v. South Carolina*, 409 U.S. 524, 528 (1973). Judges, in fact, often "understandably" do just that, to avoid "creat[ing] the impression 'that justice in a court of law may turn upon the pigmentation of skin [or] the accident of birth.'" *Rosales-Lopez*, 451 U.S. at 190 (plurality opinion) (second alteration in original) (quoting *Ristaino v. Ross*, 424 U.S. 589, 596 n.8 (1976)). Only when race is "inextricably bound up with" the issues at trial—such as when a black defendant claims white officers framed him for engaging in civil rights protests—must judges allow voir dire concerning potential racial bias. *Ristaino*, 424 U.S. at 597; *see also Ham*, 409 U.S. at 527.

Ignoring this reality, the State suggests that any defendant accused of victimizing someone of another race has a right to conduct voir dire on race. Resp. Br. 22. The interracial character of a crime, however, allows a defendant to conduct voir dire on race only in *capital* cases; in all other prosecutions, this Court has squarely held that the interracial nature of a

crime is *not* a "special circumstance" entitling the defense to demand such questioning. *Turner v. Murray*, 476 U.S. 28, 37-38 & n.12 (1986); *see also Ristaino*, 424 U.S. at 597. Unless this Court is prepared to overrule those decisions—and, indeed, to require courts to allow voir dire concerning race in every single criminal prosecution, *regardless of the race of the defendant and any victim*—the State's submission that voir dire is a panacea here fails.

c. Finally, the State overstates the efficacy of voir dire as a tool for exposing racial bias. Yes, jurors can sometimes be questioned "privately" or "indirectly" about their racial attitudes. Resp. Br. 25-26. But that does not mean defense counsel can always ferret out people who harbor racial animus. People disinclined to profess in open court that they hold racially discriminatory views will not necessarily divulge that information behind closed doors to judges and lawyers. They may even intentionally conceal their bias in hopes of getting on the jury and expressing it during deliberations. *See, e.g.*, *United States v. Henley*, 238 F.3d 1111, 1121 (9th Cir. 2001).

As evidence supposedly to the contrary, the State holds up the questionnaires of two venire members who, as the State puts it, "disclosed . . . that they were 'prejudice[d] at times' or had 'no tolerance.'" Resp. Br. 22. But in fact, Juror 36 indicated he had "no tolerance" for "*sexual assault*," and Juror 20 similarly stated that she was "prejudice[d] at times" in connection with saying anyone convicted of sexual assault deserves severe punishment. R. Seal., Jury Questionnaires at 80, 83 (emphasis added). Indicating that one takes a hard line against sexual assault is a far cry from conceding racially prejudice.

Another problem with the State's argument is that many people who pigeonhole others according to their racial identity do not even perceive their views as biased. *See Williams v. Pennsylvania*, 136 S. Ct. 1899, 1905 (2016) ("Bias is . . difficult to discern in oneself."); *Smith v. Phillips*, 455 U.S. 209, 221-22 (1982) (O'Connor, J., concurring) (jurors "may be unaware" of their own racial bias). Indeed, the more biased potential jurors are, the *less* likely they are to perceive their stereotype-laden views as anything other than fact. And when people perceive their beliefs as fact, it does not matter whether they are asked in public or in private if they are prejudiced. Either way, they will remain silent.

To be sure, indirect questioning may occasionally expose the wrongheaded views of some of these individuals. But the efficacy of indirect inquiries is inherently limited; questions crafted as proxies to unearth something else cannot always elicit the actual information the questioner is seeking. Thus, try as defense counsel might, no amount of indirect questioning—even in an imaginary world with infinite time for voir dire—could identify every problematic juror. *See* Law Prof. Br. 12.[2]

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[2] The State, for example, suggests petitioner could have gained useful information by questioning potential jurors about any "dislike of people who aren't in the country legally." Resp. Br. 7; *see also id.* at 22. But people who disapprove of undocumented aliens do not necessarily have any quarrel with *legal* immigrants, much less Hispanic persons in general. Petitioner is a lawful permanent resident who came to the United States when he was seven years old and was almost thirty at the time of trial. His alibi witness is also a lawful permanent resident. Tr. 14 (Feb. 25, 2010).

The State responds that recognizing voir dire sometimes to be ineffectual "cannot be squared" with the fact (as noted above) that defendants sometimes have a constitutional right to question jurors about race. Resp. Br. 23. But the mere fact that defendants have a constitutional right to some procedure hardly suggests the procedure is so effective that related constitutional protections are unnecessary. Take the constitutional right to confrontation and cross-examination. This Court has called cross-examination "the greatest legal engine ever invented for the discovery of truth." *Kentucky v. Stincer*, 482 U.S. 730, 736 (1987) (internal quotation marks and citations omitted). But, recognizing the limits even of that storied device, this Court has held that the prosecution must disclose material impeachment evidence, *United States v. Bagley*, 473 U.S. 667 (1985), and correct false testimony on its own, *Napue v. Illinois*, 360 U.S. 264 (1959). In short, it does not disparage a constitutional guarantee to recognize that related procedures are sometimes necessary to avoid breakdowns in the machinery of justice.

2. The State's cursory arguments concerning the other three *Tanner* factors largely rehash the musings of the Colorado Supreme Court, which petitioner has already answered. *See* Petr. Br. 21-24, 27-28. Nothing the State adds is persuasive.

a. *Observation during trial.* As petitioner has explained, observing jurors in the courtroom seldom protects against racial bias. Petr. Br. 21-22. The State notes that court personnel sometimes interact with jurors *outside* the courtroom. Resp. Br. 35. But any evidence arising from those interactions would be considered "external evidence" (a topic petitioner

turns to next), not evidence from observing the jury during trial.

b. ***External evidence.*** The State does not dispute that nonjuror evidence of racially biased statements made *during* deliberations rarely exists. The State maintains, however, that the ability to procure external evidence *before* deliberations begin can genuinely guard against racial bias infiltrating the jury room. As support, the State cites a smattering of cases where persons reported juror comments they overheard "at a bar," "a club," "a court restroom," and the like. Resp. Br. 33-34. It should be obvious that such fortuitous occurrences are a far cry from any meaningful systematic protection.

Nor is the State correct when it suggests (Resp. Br. 34-35) that the ability to scan jurors' "social media" accounts is a dependable substitute for the constitutional rule petitioner seeks here. "[T]o protect [jurors'] privacy," judges may "restrict, if not forbid," trial counsel from researching jurors' internet presence. *See, e.g.*, *Oracle Am., Inc. v. Google, Inc.*, 2016 WL 1252794, at *2 (N.D. Cal. Mar. 25, 2016). And in run-of-the-mill prosecutions, practical considerations weigh heavily as well. Defense counsel in Colorado, for example, typically receive jury questionnaires minutes before the beginning of voir dire, rendering it impossible to conduct internet research in time to challenge potential jurors for cause. And even when judges allow such searches and attorneys are able to conduct them, few people will display racial animosity on their publicly viewable social media pages anyway. (There is no reason to believe Juror H.C. did here.)

In any event, it would be unwise for this Court to deal with the timeless problem of racial bias by leaning on the current existence—much less the current privacy configurations—of various social media websites. It is anyone's guess what Facebook, for example, might look like even a few years from now.

c. *Pre-verdict juror reports.* As with the smattering of cases concerning external evidence, the handful of cases the State gathers involving pre-verdict juror reports (Resp. Br. 31-32) hardly demonstrates that defendants need not sometimes introduce post-verdict testimony to prove that racial bias infected deliberations. Juries are directed to evaluate the evidence in light of "common sense" and their "observations and experience in life." Petr. Br. 22 (quoting instructions reproduced at J.A. 55). And racial bias is often expressed in just those terms; Juror H.C., for example, described his views as arising from "his personal beliefs and everyday experience." Pet. App. 10a. Accordingly, jurors often view others' racially prejudiced remarks as part of a reasonable (if deeply disquieting) exchange of perceptions—or at least not so out-of-bounds as to warrant breaking ranks and reporting to the judge before issuing a verdict. Petr. Br. 23-24.

The State responds that jurors can be expressly instructed that racial bias is illegitimate and should not affect their deliberations. Resp. Br. 33. True enough, but juries are also typically instructed not to consider any external information or to succumb to improper outside influence. *See, e.g.*, J.A. 65. And yet, this Court has long recognized that such conversation in the jury room is so corrosive that

when jurors disregard those instructions and no one steps forward before the verdict is rendered, jurors must be permitted in post-trial proceedings to recount the misconduct. *See Remmer v. United States*, 347 U.S. 227, 228-30 (1954) (outside influence); *Mattox v. United States*, 146 U.S. 140, 142-51 (1892) (external evidence). The same reasoning applies here.

B. Other Purported Protections

None of the other structural features of the jury system the State mentions provides an efficacious barrier against racial bias.

1. The State argues the fair cross-section requirement and the prohibition against race-based peremptory strikes help counteract racial bias because "diverse groups deliberate longer and consider a wider range of information than homogeneous groups." Resp. Br. 36-39. There are two problems with this argument.

First, notwithstanding rules designed to prevent racial discrimination in jury selection, juries commonly are racially homogeneous. Demographics alone dictate this reality. Some 200 counties in the United States are over 97.8% white; 1,167 counties (about one-third of the entire country) are over 90% white.[3] Furthermore, even when significant minority populations are present, they are often substantially underrepresented in jury pools. *See* Hispanic Nat'l

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[3] *See* Niraj Chokshi, *Diversity in America's Counties, in 6 Maps*, Wash. Post (June 30, 2014); Philip Bump, *How the Most Heavily White, Black, and Hispanic Counties in America Voted in 2012*, Wash. Post (Jan. 20, 2015).

Bar Ass'n Br. 14-18 (detailing "acute" underrepresentation of Hispanics in New York, Houston, and elsewhere); Nat'l Congress of Am. Indians Br. 11-13 (detailing underrepresentation of Native Americans); Ashish S. Joshi & Christina T. Kline, *Lack of Jury Diversity: A National Problem with Individual Consequences*, American Bar Ass'n, Section of Litigation (2015).[4] It is no surprise, therefore, that cases are legion in which venire pools produce only one or two prospective minority jurors, and prosecutors, entirely consistent with *Batson v. Kentucky*, 476 U.S. 79 (1986), strike those individuals from presumptive juries. *See, e.g.*, Caren Myers Morrison, *Negotiating Peremptory Challenges*, 104 J. Crim. L. & Criminology 1, 39-40 (2014). That seems to have happened here.[5]

Even when juries have at least some measure of racial heterogeneity, that hardly guarantees racial prejudice will not influence deliberations. When someone makes a racially biased remark, others (particularly if outnumbered in the jury room) commonly seek to avoid conflict and keep quiet. *See* Petr. Br. 23-24. And even when a juror does speak up, it may not matter. Bias in just one member of a multi-member decision-making group corrupts the entire group's work, *see Williams*, 136 S. Ct. at 1909, and it is unlikely that jurors such as Juror H.C. can

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[4] http://www.americanbar.org/groups/litigation/committees/diversity-inclusion/news_analysis/articles_2015/lack-of-jury-diversity-national-problem-individual-consequences.html.

[5] The record here does not reflect the race of the jurors. But the State struck the only presumptive juror with a Hispanic surname. *See* Tr. 322 (Feb. 23, 2010) (striking Juror 15).

be persuaded to change their minds concerning views (supposedly) informed by their "personal beliefs" and decades of "everyday experience," Pet. App. 10a.

2. The State's reliance on the fact that courts typically require a unanimous vote of twelve jurors to convict is even farther afield. First off, the State neglects to mention that the Constitution does not require jury unanimity, and two states allow convictions by 10-2 votes. *Apodaca v. Oregon*, 406 U.S. 404 (1972); *Johnson v. Louisiana*, 406 U.S. 356 (1972). In these jurisdictions, juries may "reach a quorum without seriously considering minority voices, thereby effectively silencing those voices and negating their participation." American Bar Ass'n, *Principles for Juries and Jury Trials with Commentary* 24 (2005).

More fundamentally, as just noted, any counter-measure that requires jurors not only to confront their peers in an already stressful setting, but also to change those persons' minds, is of limited utility.

* * *

All in all, the State identifies various procedures and serendipitous occurrences that sometimes prevent people who harbor racial prejudice from serving on juries and influencing deliberations. But there is no avoiding the fact that, despite the criminal justice system's best efforts, there will be cases where jurors interject racial bias into the jury room and encourage others to find defendants guilty on that basis. The question is whether a substantial enough state interest justifies barring defendants in these grave and exceptional cases from introducing the evidence necessary to prove that occurred. Petitioner now turns to that issue.

II. No State Interest Justifies Barring Juror Testimony Offered To Prove That Racial Bias Infected Deliberations.

As petitioner has noted, no state has a categorical no-impeachment rule; every state has at least some exceptions to the rule against jurors' post-verdict testimony about deliberations. Petr. Br. 29-30. Indeed, over twenty jurisdictions already specifically allow jurors to testify to prove that racial bias infected deliberations. *Id.* at 30-32. And neither the State, the twelve other states that support it, nor the Solicitor General disputes petitioner's empirical assertion that none of these exceptions has caused any problems. Petr. Br. 33-45; *see also* Retired Judges Br. 3-7; Law Professors Br. 14-21; Nat'l Ass'n of Fed. Defenders Br. 15-25.[6]

Instead, the State and its amici offer entirely theoretical arguments in support of barring jurors from testifying regarding racial bias. But surely the Constitution requires more than unsubstantiated speculation before tolerating the unique toxin of

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[6] The twelve states' amicus brief quibbles over the number of states with specific exceptions for racial bias, saying (i) it is "pointless" to count states that have adopted these exceptions to satisfy the Sixth Amendment and (ii) it is improper to count states without state high court decisions directly on point. Indiana Br. 7-8. But insofar as the debate here turns on the practical question whether having an exception for racial bias "undermine[s] vital interests of the jury system," Resp. Br. 41, it does not matter *why* any given state adopted such an exception; it just matters whether a state has one. And as the amici states should know, intermediate court decisions and legislative rules can establish state law just as clearly as state high courts can.

racial prejudice in the criminal justice system. At any rate, none of the State's theoretical arguments withstands scrutiny.

1. ***Full and frank discussion.*** Citing *Tanner v. United States*, 483 U.S. 107 (1987), and *Warger v. Shauers*, 135 S. Ct. 521 (2014), the State maintains this Court has already decided that the interest in full and frank discussion must prevail here. Resp. Br. 43 & n.12. But neither case involved racial bias. And this Court has noted that principles not present in those cases sometimes dictate that ignoring juror testimony is "too high a price" to pay for preserving freedom of debate. *Clark v. United States*, 289 U.S. 1, 13-14 (1933); *see also Warger*, 135 S. Ct. at 529 n.3 ("There may be cases of juror bias so extreme" that the Sixth Amendment demands consideration of jury testimony recounting deliberations.); *McDonald v. Pless*, 238 U.S. 264, 268-69 (1915) (There may be instances in which juror testimony recounting deliberations "could not be excluded without 'violating the plainest principles of justice.'" (quoting *United States v. Reid*, 53 U.S. (12 How.) 361, 366 (1851))).

As petitioner has explained, our Constitution's singular antipathy toward racial prejudice is such a principle. Petr. Br. 17-19, 34-35. The State offers no real response, other than speculating that allowing juror testimony regarding racial statements could "drive racism underground." Resp. Br. 45. It is hardly apparent that would be a bad thing in the jury room. At any rate, it is probably wishful thinking. As noted above, people like Juror H.C. do not necessarily perceive their own views as bigoted. Nor are they likely to be aware of the niceties of no-impeachment

rules—especially against the backdrop of jurors' default right to publicize deliberations to all the world. *See* Petr. Br. 35-36. So biased jurors otherwise inclined to speak are unlikely to bite their tongues during deliberations, no matter what the rules regarding post-verdict testimony may be.

2. *Juror harassment.* The State parrots the Colorado Supreme Court's prediction that allowing post-trial testimony regarding racial bias "would 'incentivize post-verdict harassment of jurors.'" Resp. Br. 48 (quoting Pet. App. 15a). But this ignores the reality that harassment is not a problem in the numerous jurisdictions already allowing such testimony. *See* Petr. Br. 37. The State also ignores the effectiveness of established procedures in Colorado and elsewhere that regulate juror contact for purposes of administering other exceptions to no-impeachment rules. *See id.* at 37-38. All that is required here is for trial courts to apply the same restrictions to attempts by defense counsel to inquire about racial bias in the jury room—as the trial court did in this case. *See* Resp. Br. 11 n.6 (describing the court's "careful and through" management of post-trial proceedings); Petr. Br. 7-9 (same).

3. *Finality.* None of the State's attempts to defend its evidentiary bar in terms of finality is convincing.

The State first posits there is "little chance" that the meager number of reversals over the past several years is "representative" of the true impact of the racial bias exception in jurisdictions that already recognize it. Resp. Br. 47; *see* Petr. Br. 39 (recounting statistics). But neither the State nor its amici—despite their ready access to prosecutorial

information and records—offers any tangible reason to doubt the rarity of reversals on this ground. Nor is there any intuitive reason to doubt this reality; expressions of racial animus, especially in the course of solemn government service, are thankfully uncommon.

The State next complains that finality "is disrupted not only when a court actually disturbs a verdict but also when it allows inquiry into the verdict's validity." Resp. Br. 46. But, again, the State gives no reason to believe such inquiries into racial bias need to occur with any frequency. And when such inquiries do occur, courts can follow the longstanding procedures for administering Rule 606(b)'s exceptions for external evidence and improper influences. *See* Petr. Br. 39; Nat'l Ass'n of Fed. Defenders Br. 15-25.

The State responds that Rule 606(b)'s exceptions are different because they "do not reveal the jury's internal discussions." Resp. Br. 51. The State is mistaken. Those exceptions have always depended on juror testimony describing what was said, as well as "who learned or knew or participated" in any improper discussions during deliberations. Christopher B. Mueller & Laird C. Kirkpatrick, Federal Evidence § 6:23, at 129 (4th ed. 2013); *see also Mattox v. United States*, 146 U.S. 140, 142-43 (1892) (considering juror affidavits recounting statements made "while the jury were deliberating of their verdict"). To be sure, the external-evidence and improper-influence exceptions do not permit any inquiry into individual jurors' "thought processes," Resp. Br. 52. But neither does the racial bias exception petitioner seeks. *See* Law Professors' Br. 16

(collecting case law from jurisdictions that recognize the exception).

Finally, the State suggests that allowing jurors to testify in rare instances where racial bias has led to conviction will give courts too much supervisory authority over verdicts, thereby stripping juries of their historical "independence." Resp. Br. 50. This argument stands the concept of jury independence on its head. The Framers insisted juries be independent "to prevent oppression by the Government," *Duncan v. Louisiana*, 391 U.S. 145, 155 (1968), not to insulate arbitrary guilty verdicts from review. *See also* NAACP Br. 7-9. That is why acquittals are inviolate, *Evans v. Michigan*, 133 S. Ct. 1069, 1074 (2013), but judges may overturn guilty verdicts when a malfunction occurred or they simply "disagree[] with a jury's resolution of conflicting evidence and conclude[] that a guilty verdict is against the weight of the evidence," *Tibbs v. Florida*, 457 U.S. 31, 42 (1982); *see generally* Wayne R. LaFave, et al., Criminal Procedure § 24.11 (5th ed. 2009).

Even setting aside the State's historical inversion, there is no reason why our legal system would *want* to protect the ability of juries to render convictions on the basis of their race. "Discrimination on the basis of race, odious in all aspects, is especially pernicious in the administration of justice." *Rose v. Mitchell*, 443 U.S. 545, 555 (1979). It is, therefore, "an affront to justice to argue that a fair trial includes the right to discriminate against a group of citizens based upon their race." *Georgia v. McCollum*, 505 U.S. 42, 57 (1992). Put another way, a juror who urges others to convict someone based on racial bias "breaches the compact [requiring a verdict based

solely on the evidence] and renounces his or her oath." *J.E.B. v. Alabama*, 511 U.S. 127, 153 (1994) (Kennedy, J., concurring in the judgment). Such actions warrant denunciation and ameliorative measures, not insulation from scrutiny.

4. *Public confidence in the administration of justice.* The State does not disagree that allowing guilty verdicts driven by blatant racial prejudice to stand—in and of itself—would erode public confidence in the criminal justice system. It would be impossible to argue otherwise. But the State maintains there is nothing this Court can do about that, for mandating an exception to no-impeachment rules here but not in cases like *Tanner* and *Warger* "would appear to treat defendants unequally despite compelling reasons not to." Resp. Br. 49; *see also* Resp. Br. 54 ("Petitioner's approach would create disparities among defendants with other compelling Sixth Amendment claims.").

This argument ignores the volumes of constitutional case law that already differentiate racial stereotyping from other, less odious forms of bias. Neither the Equal Protection Clause nor the Due Process Clause, for example, expressly distinguishes racial bias from any other form of partiality. *See* U.S. Const. amends. V, XIV. But if there is one thing this Court has made clear when applying those provisions, it is that racial stereotyping causes "special harms" and "therefore warrants different analysis." *Shaw v. Reno*, 509 U.S. 630, 649-50 (1993); *see also* Petr. Br. 42-44 (discussing decisions treating race differently in context of composing grand juries, conducting voir

dire, and exercising peremptory challenges). That is all this Court needs to say in this case as well.

The public will readily understand the distinction. It would likely be puzzled if this Court said anything else.

CONCLUSION

For the foregoing reasons, the judgment of the Colorado Supreme Court should be reversed.

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In the Supreme Court of the United States

MIGUEL ANGEL PEÑA RODRIGUEZ, PETITIONER

v.

STATE OF COLORADO

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF COLORADO

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT

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QUESTION PRESENTED

Whether the prohibition in Colorado Rule of Evidence 606(b) on the impeachment of jury verdicts with testimony about jurors' statements during deliberations violates the Sixth Amendment right to an impartial jury in cases in which litigants seek to offer evidence of statements in jury deliberations to prove racial bias.

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McDonald v. *Pless*, 238 U.S. 264 (1915) 2, 3, 18, 20, 32
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Colorado R. Evid. 606(b) ..... *passim*

Miscellaneous:

1 Kenneth S. Broun, *McCormick on Evidence* (7th ed. 2013) 14

Ellen S. Cohn et al., *Reducing White Juror Bias: The Role of Race Salience and Racial Attitudes*, 39 J. Applied Soc. Psychol. 1953 (2009) 28

James W. Diehm, *Impeachment of Jury Verdicts: Tanner v. United States and Beyond*, 65 St. John's L. Rev. 389 (1991) 23

Alyson A. Grine & Emily Coward, *Raising Issues of Race in North Carolina Criminal Cases* (2014), http://defednermanuals.sog.unc.edu/race/8-addressing-race-trial 26

H.R. 5463, 93d Cong., 1st Sess. (1973) 4

H.R. Rep. No. 650, 93d Cong., 1st Sess. (1973) 4

Hon. Gregory E. Mize et al., *The State-of-the-States Survey of Jury Improvement Efforts: A Compendium Report* (2007), http://www.ncsc-jurystudies.org/~/media/Microsites/Files/CJS/SOS/SOSCompendiumFinal.ashx 27

Jeff Robinson & Jodie English, *Confronting the Race Issue in Jury Selection*, The Advocate, May 2008, http://apps.dpa.ky.gov/library/advocate/pdf/2008/adv050108.pdf 26

1 Leonard B. Sand, et al., *Modern Federal Jury Instructions: Criminal* (2016) 30

Miscellaneous—Continued: Page

Regina A. Schuller et al., *The Impact of Prejudice Screening Procedures on Racial Bias in the Courtroom*, 33 Law & Hum. Behav. 320 (2009) 28

Rule of Evidence for United States Courts & Magistrates, 56 F.R.D. 183 (1972) 4

S. Rep. No. 1277, 93d Cong., 2d Sess. (1974) 4, 18, 20, 22

Samuel R. Sommers & Phoebe C. Ellsworth, Symposium, *How Much Do We Really Know About Race and Juries? A Review of Social Science Theory and Research*, 78 Chi. -Kent L. Rev. 997 (2003) 28

Uniform R. Evid. 606(b) (1999) 5

Wisconsin State Pub. Defender's Office, *Talking to Juries About Race: Building Theories & Themes Around Racial Issues at Trial*, http://wispd.org/attachments/article/254/Building%20Theories%20and%20Themes%20around%20Racial%20Issues%20at%20Trial-%20Talking%20to%20Juries%20about%20Race.pdf 26

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TO THE SUPREME COURT OF COLORADO

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT

INTEREST OF THE UNITED STATES

This case involves the constitutionality of Colorado Rule of Evidence 606(b) as applied to allegations that a juror made racially biased statements during deliberations. Colorado Rule of Evidence 606(b) parallels Federal Rule of Evidence 606(b) (App. C, *infra*, 15a), which applies in federal criminal prosecutions and civil actions to which the United States is a party. The United States therefore has a substantial interest in the resolution of this case.

STATEMENT

Colorado generally prohibits impeachment of jury verdicts with evidence concerning statements that jurors made during deliberations, while providing other mechanisms that litigants may use before, during, and after trial to protect the right to a fair and impartial jury. That approach reflects a centuries-old accommodation of fair-trial interests. And it is con-

sistent with the Sixth Amendment, whether the statements from deliberations that a litigant seeks to admit bear on racial prejudice or on other types of bias or misconduct.

A. Common-Law And Statutory Background

1. The principle that evidence concerning statements during jury deliberations may not be used to impeach a verdict goes back more than 200 years. It dates at least to *Vaise* v. *Delaval*, (1785) 99 Eng. Rep. 944 (K.B.), in which a party sought to set aside a verdict by offering an "affidavit from two jurors claiming that the jury had decided the case through a game of chance." *Warger* v. *Shauers*, 135 S. Ct. 521, 526 (2014). Lord Mansfield acknowledged that submitting a verdict to chance would be "a very high misdemeanor," but concluded that the court could not consider jurors' affidavits to impeach the verdict. *Vaise*, 99 Eng. Rep. at 944.

That principle "took root in the United States," *Warger*, 135 S. Ct. at 526, in decisions in which this Court and others concluded that the interests served by protecting the confidentiality of jury deliberations outweighed the benefits of impeaching final judgments with evidence from those deliberations. For instance, in *McDonald* v. *Pless*, 238 U.S. 264 (1915), this Court wrote that the principle of *Vaise* "chooses the lesser of two evils" in light of "conflicting considerations" of justice. *Id.* at 267. One consideration was the interest in identifying cases in which "the jury adopted an arbitrary and unjust method in arriving at their verdict." *Ibid.* But other considerations weighed against admitting evidence from deliberations: If "what was intended to be a private deliberation" was made "the constant subject of public inves-

tigation," the Court explained, the result would be "the destruction of all frankness and freedom of discussion and conference." *Id.* at 267-268. Further, the Court reasoned, allowing statements from deliberations to be used to impeach verdicts "would open the door to the most pernicious arts and tampering with jurors," from which "no verdict would be safe." *Id.* at 268 (citations omitted).

In view of that calculus, this Court held in *McDonald* that juror testimony concerning what occurred during deliberations could not be offered to show that a verdict was reached through an unlawful method (a "quotient verdict," in which jurors set damages by averaging the amounts each juror thought appropriate). 238 U.S. at 265-269. That decision reflected what was known as the "federal approach," under which evidence of statements in jury deliberations could not be used to impeach a verdict unless the evidence "was offered to show that an 'extraneous matter,'" such as influence from a person or materials outside the jury itself, "had influenced the jury." *Warger*, 135 S. Ct. at 526-527 (internal quotation marks omitted). The Court similarly held in *Hyde* v. *United States*, 225 U.S. 347 (1912), that jurors could not testify that members of a divided jury had agreed to convict two defendants in exchange for other jurors' agreeing to acquit two others. *Id.* at 382-384.

2. The Federal Rules of Evidence adopted the limited federal approach to the use of juror statements, with no exception for any type of bias or prejudice. This Court promulgated draft Federal Rules of Evidence that barred jurors from offering evidence as to "any matter or statement occurring during the course of the jury's deliberations"—subject only to the set-

tled common-law exceptions for testimony on "whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror." *Rules of Evidence for United States Courts and Magistrates*, 56 F.R.D. 183, 265 (1972).

Congress agreed that this Court's proposed rule best accommodated competing fair-trial interests. Congress initially prevented the proposed Rules of Evidence from taking automatic effect, Act of Mar. 30, 1973, Pub. L. No. 93-12, 87 Stat. 9, and then considered a variety of changes. The House Judiciary Committee proposed that the prohibition on impeachment of verdicts be narrowed to bar only testimony of a juror concerning "the effect of anything upon his or any other juror's mind or emotions as influencing him to assent to or dissent from the verdict or indictment or concerning his mental processes in connection therewith." H.R. 5463, 93d Cong., 1st Sess., 33 (1973); see H.R. Rep. No. 650, 93d Cong., 1st Sess. 9-10 (1973). But the Senate Judiciary Committee opposed the change, reasoning that it would hinder the "full and free debate necessary to the attainment of just verdicts," unduly undermine finality, and "permit the harassment of former jurors by losing parties as well as the possible exploitation of disgruntled or otherwise badly-motivated ex-jurors." S. Rep. No. 1277, 93d Cong., 2d Sess. 14 (1974) (*Senate Report*). Congress adopted the Senate approach. Act of Jan. 2, 1975, Pub. L. No. 93-595, 88 Stat. 1934; see Fed. R. Evid. 606(b) (1975) (generally barring juror testimony as to "any matter or statement occurring during the course of the jury's deliberations").

The National Conference of Commissioners of Uniform State Laws recommended the same common-law based balance. See Uniform R. Evid. 606(b) (1999). While state laws vary in their details, States have uniformly chosen to adopt some form of no-impeachment rule, and only a minority have interpreted their laws to authorize use of evidence of what was said in deliberations in order to establish racial bias. See Indiana et al. Amicus Br. 6-9, 1a-6a (identifying 12 States that permit such impeachment and one State in which intermediate appellate courts have allowed such impeachment).

B. Petitioner's Case

1. In 2007, three teenage sisters entered a bathroom at a race track in Colorado. 02/24/10 Tr. 5, 12-13. A man whom the girls had seen outside the bathroom followed them inside and asked if they wanted to "drink or party." *Id.* at 14-15. The girls said no, and one of them immediately left the bathroom. *Id.* at 15-16. The other two girls thought the man would leave, but he instead turned off the lights and grabbed them. *Id.* at 16-17. One girl felt his hand on her lower back and buttocks as he pulled her closer. *Id.* at 18, 52. The other felt his hand start on her shoulder and move toward her breast. *Id.* at 106, 109. After a struggle, the girls freed themselves and left the bathroom. *Id.* at 19-20, 109.

Based on the girls' descriptions, the girls' father recognized the assailant as petitioner, whom he had spoken to earlier that day. 02/24/10 Tr. 138-139, 143-144. The father informed a security guard of the assaults, and while he and the guard were speaking, he saw petitioner speed away in a pickup truck. *Id.* at 145-148. Sheriff's deputies located petitioner later

that night, and the two girls each identified him during separate one-on-one show-ups. *Id.* at 22-23, 112, 172-173, 182-187.

2. a. The State charged petitioner with felony attempted sexual assault, unlawful sexual contact, and two misdemeanor counts of harassment. D. Ct. R. 28-29.

In advance of trial, the district court distributed questionnaires to jurors seeking written responses to preliminary questions. See J.A. 13-14. Thereafter, the court conducted in-person voir dire, in which it asked questions and then permitted attorneys to question the venire directly. Before opening the floor to the attorneys, the judge advised defense counsel that "in the past, some of our jurors have been vocal in their dislike of people who aren't in the country legally. So I don't know if that's an issue for you or your client, but you may want to address it." J.A. 16. During voir dire, however, petitioner's counsel did not ask any questions about race, ethnicity, national origin, or immigration status. J.A. 23-35.

The case proceeded to trial. Both victims identified petitioner at trial as the man who had entered the bathroom and grabbed them. 02/24/10 Tr. 16, 104. Petitioner's counsel put forward the theory that the girls had misidentified petitioner, relying on testimony from a friend of petitioner that petitioner had been visiting him in a nearby stable at the time of the assault. 02/25/10 Tr. 16-17, 50-59.

At the close of trial, the district court provided the parties with draft instructions and offered an opportunity to propose changes. See 02/25/10 Tr. 5-12. The court's instructions charged that jurors' decisions "must be made by applying the rules of law which I

give you to the evidence presented at trial." J.A. 54. The court further instructed that "[n]either sympathy nor prejudice should influence your decision." *Ibid.* The instructions directed jurors "not to allow gender bias or any kind of prejudice based upon gender to influence your decision," but did not address bias based on race, ethnicity, or national origin. J.A. 57. Neither party requested a charge on these forms of bias. 02/25/10 Tr. 5-12.

The jury convicted petitioner on the misdemeanor counts but could not reach a verdict on the felony count. J.A. 70-71. The court sentenced petitioner to two years of supervised probation. J.A. 6.

b. After trial, two jurors approached defense counsel and alleged that another juror (Juror 11 or "H.C.") made statements during deliberations that reflected ethnic prejudice. Petitioner's counsel subsequently obtained affidavits from those two jurors recounting the alleged statements. The first juror stated that H.C. had said that he thought petitioner "did it because he's Mexican and Mexican men take whatever they want," and that Mexican men "have a sense of entitlement and think they can 'do whatever they want' with women." J.A. 151. The second juror stated that H.C. had said that he believed that petitioner "was guilty because, in his experience as an ex-law enforcement officer, Mexican men had a bravado that caused them to believe they could do whatever they wanted with women." J.A. 151-152. That affidavit alleged that H.C. stated that when he was a law-enforcement officer, "nine times out of ten, Mexican men were guilty of being aggressive toward women and young girls." J.A. 152. The juror stated that H.C. also expressed the belief that petitioner's alibi witness

was not credible "because, among other things, he was 'an illegal.'" *Ibid.*

Petitioner moved for a new trial, relying on the allegations concerning H.C.'s statements in deliberations. Petitioner invoked the Sixth Amendment principles that a defendant is entitled to a "fair and impartial" jury and that a defendant may be entitled to a new trial when a juror made misrepresentations during voir dire concerning biases that would have justified removal from the jury. D. Ct. R. 272; see *id.* at 274-275.

The district court denied petitioner's motion. J.A. 150-160. The court explained that the only evidence petitioner had offered that H.C. harbored ethnic bias consisted of affidavits concerning "statements during deliberations." J.A. 160. Those statements, the court explained, could not "weigh in the determination of whether Juror No. 11 failed to disclose * * * alleged bias during voir dire" because use of statements from jury deliberations to impeach a verdict was barred by Colorado Rule of Evidence 606(b). *Ibid.*; see J.A. 158.

3. The Colorado Court of Appeals affirmed, concluding that petitioner's challenge to application of Colorado Rule of Evidence 606(b) was waived. Pet. App. 28a-64a. The court noted that petitioner had chosen not to ask questions "about racial bias during voir dire," and it found "no reason to conclude here that diligent voir dire would have left [petitioner's] rights to a jury free of racial bias unprotected." *Id.* at 50a-51a. The court found that petitioner's failure to "use reasonable diligence during jury selection" barred his challenge to application of Colorado Rule of Evidence 606(b). *Id.* at 53a.

4. The Colorado Supreme Court affirmed, over the dissent of three justices. Pet. App. 1a-16a. The court concluded that Colorado Rule of Evidence 606(b) barred the impeachment of a jury verdict with evidence of racially prejudiced statements during deliberations, *id.* at 6a-11a, and that the rule did not violate petitioner's rights under the Sixth Amendment, *id.* at 11a-16a. It noted that *Tanner* v. *United States*, 483 U.S. 107 (1987), and *Warger*, 135 S. Ct. at 528, had rejected Sixth Amendment challenges to applications of nearly identical evidentiary shields. Pet. App. 12a-14a. Those decisions, the court observed, reasoned that prohibitions on the use of evidence of statements or conduct in deliberations, such as Colorado Rule of Evidence 606(b), served important public policies. Pet. App. 12a-14a. The court further observed that *Tanner* and *Warger* emphasized that litigants had other mechanisms to protect the right to a fair and impartial jury. *Ibid.*

The Colorado Supreme Court concluded that while *Tanner* and *Warger* involved misconduct other than racial bias, it could not "discern a dividing line between different *types* of juror bias or misconduct" that would necessitate a different Sixth Amendment analysis. Pet. App. 14a-15a. Further, it observed, the safeguards deemed sufficient to protect the impartial-jury right in *Tanner* and *Warger* were present when the form of partiality alleged was racial or ethnic bias. *Id.* at 15a.

SUMMARY OF ARGUMENT

Colorado Rule of Evidence 606(b) does not violate the Sixth Amendment when applied to prevent litigants from impeaching verdicts with juror testimony about racially biased statements during deliberations.

A. State and federal lawmakers have broad constitutional latitude to enact evidentiary rules that balance competing interests of justice. These rules may exclude even relevant evidence to serve important public interests. In view of that principle, this Court has twice upheld against constitutional challenge applications of a federal evidentiary rule paralleling Colorado Rule of Evidence 606(b)—a federal rule that this Court promulgated and Congress enacted that contains no exceptions for particular kinds of bias. *Warger* v. *Shauers*, 135 S. Ct. 521 (2014); *Tanner* v. *United States*, 483 U.S. 107 (1987). This Court has reasoned that the limits of Rule 606(b) protect important fair-trial interests and that alternative mechanisms remain available to safeguard the right to a fair and impartial jury.

B. Colorado Rule of Evidence 606(b) is constitutional when it is applied to bar jurors from testifying regarding statements in deliberations in order to impeach verdicts based on claims of racial bias.

1. The interest in full and frank discussion in the jury room furthered by Rule 606(b) would be disserved by permitting litigants to impeach jury verdicts based on allegations of racially biased statements in deliberations. Jurors engaged in heated discussions may reasonably fear that even unprejudiced views could be misunderstood as reflecting racial bias—particularly in cases that themselves touch on racial discrimination. Especially because of the social opprobrium that attaches to racial prejudice, petitioner's proposed post-trial inquiries risk chilling the honest and unprejudiced exchange of views.

Rule 606(b) also serves interests in preventing harassment of jurors and post-verdict juror tampering. A

race-related exception would create the same incentive for harassment and tampering as would an exception enabling litigants to overturn verdicts based on juror accounts of other prejudicial statements or misconduct in deliberations.

Rule 606(b) likewise serves society's interest in finally resolving cases—an interest that is present whether a post-verdict claim pertains to racial bias or to other types of jury-room prejudice or misconduct. The argument that a race-related exception would be narrow and that no-impeachment rules already have exceptions could just as easily have justified the exception sought in *Tanner*. But the Court gave weight to finality interests there, and the same analysis applies here.

Finally, as in *Tanner*, opening up new avenues for challenging jury verdicts based on accounts of what was said in deliberations would undermine "the community's trust in a system that relies on the decisions of laypeople." 483 U.S. at 121. Rule 606(b) avoids the erosion of public confidence that can result from post-trial attacks that are based on often-disputed claims about what transpired during deliberations.

2. The alternative safeguards of the right to a fair and impartial jury that *Tanner* and *Warger* emphasized are at least as effective with respect to racial prejudice as with respect to other types of partiality and misconduct.

This Court has understood voir dire as a particularly important safeguard against racial bias. The Court's decisions requiring and recommending opportunities for questioning on racial prejudice reflect the understanding that questioning jurors under oath is an effective way of identifying those who harbor racial

biases. Trial courts do have broad discretion over the scope of voir dire on this subject. But trial courts have broad discretion over voir dire on every subject, not simply questions related to race, yet this Court has nevertheless treated voir dire as an important safeguard of jury impartiality.

The additional safeguards this Court has identified are no less potent with respect to racial bias than they are with respect to many other types of prejudice and misconduct. Jurors can (and do) report racial bias in deliberations prior to verdict, just like other forms of misconduct. The likelihood of such reporting is enhanced by jury instructions that all but invariably warn jurors that bias and prejudice are prohibited, and by the social opprobrium attached to racist views.

Non-jurors may also report bias or misconduct during trial. That safeguard is at least as available for racial prejudice as for many other forms of jury-room misconduct or bias, such as the use of impermissible methods like a coin flip or quotient verdict in *Vaise* and *McDonald* and the pro-defendant bias alleged in *Warger*. Indeed, cases reflect that jurors who have racially prejudiced reactions during trial may express those reactions in the presence of court personnel, attorneys, or observers.

Finally, the right to an impartial jury is protected by litigants' ability to impeach final judgments with nonjuror evidence of misconduct. That safeguard is present with respect to racist jurors, because jurors who articulate racist attitudes inside the jury room will often express them outside the courtroom. When a juror's out-of-court statements establish that the juror misrepresented his or her ability to be fair and

impartial, Rule 606(b) does not prevent impeachment of the verdict after trial.

3. The Sixth Amendment does not support departing from the framework of *Tanner* when the type of juror partiality alleged is racial bias, rather than another form or prejudice or misconduct. The Sixth Amendment guarantees the right to a fair and impartial jury. That guarantee is violated whenever jurors decide a case using bias, prejudice, or arbitrary decision-making methods. The Amendment does not distinguish between racial bias and other types of partiality.

ARGUMENT

A DEFENDANT HAS NO SIXTH AMENDMENT RIGHT TO IMPEACH A VERDICT WITH EVIDENCE OF RACIALLY BIASED STATEMENTS DURING JURY DELIBERATIONS

Colorado Rule of Evidence 606(b) embodies a long-standing balance between competing fair-trial considerations. The rule protects finality values and the integrity of deliberations by barring use of evidence of jurors' statements or conduct during deliberations in order to impeach a verdict, while leaving open alternative avenues to safeguard the right to a fair and impartial jury. In related contexts, this Court has twice rejected constitutional challenges to substantively identical bans on offering evidence of juror statements or conduct during deliberations to impeach a verdict. It has reasoned that such rules advance important public policies without unduly impinging on Sixth Amendment interests. That analysis applies here. Racial bias in deliberations is odious, but alternative mechanisms exist to protect a defendant's right to an impartial jury without sacrificing the values furthered by Rule 606(b).

A. Rule 606(b) Is A Constitutional Means of Serving Important Social Interests In The Integrity of the Jury System

"State and federal rulemakers have broad latitude under the Constitution to establish rules excluding evidence" in court proceedings. *Holmes* v. *South Carolina*, 547 U.S. 319, 324 (2006) (brackets omitted) (quoting *United States* v. *Scheffer*, 523 U.S. 303, 308 (1998)). Some rules exclude evidence based on a judgment about reliability. See, *e.g.*, *Scheffer*, 523 U.S. at 308-309. But other rules, such as privileges for marital communications, attorney-client communications, and state secrets, exclude highly probative evidence based on competing social policies. 1 Kenneth S. Broun, *McCormick on Evidence* § 72, at 466-467 (7th ed. 2013). This Court has accorded lawmakers flexibility in balancing these competing values—even when litigants wish to offer evidence to vindicate constitutionally significant interests. For instance, this Court has held that when a defendant seeks to offer evidence during a criminal trial itself, application of a state evidentiary prohibition is unconstitutional only if it both "infring[es] upon a weighty interest of the accused," and is "'arbitrary' or 'disproportionate to the purposes [the rule is] designed to serve.'" *Holmes*, 547 U.S. at 324 (citations omitted).

This Court has similarly respected lawmakers' balancing of policy considerations in addressing post-trial claims under the Sixth Amendment. In *Warger* v *Shauers*, 135 S. Ct. 521, 528 (2014), and *Tanner* v. *United States*, 483 U.S. 107 (1987), the Court upheld applications of Federal Rule of Evidence 606(b) to bar the impeachment of verdicts with jurors' testimony concerning their deliberations, relying on the compel-

ling interests furthered by the rule and the availability of other mechanisms to safeguard the right to a fair and impartial jury.

Tanner rejected a Sixth Amendment challenge to application of Federal Rule of Evidence 606(b) to bar consideration of jurors' testimony that jurors used cocaine and marijuana and consumed alcohol during trial. 483 U.S. at 115-116. The Court did not doubt that the allegations, if proven, could establish a Sixth Amendment violation, because "a defendant has a right to 'a tribunal both impartial and mentally competent to afford a hearing.'" *Id.* at 126 (citation omitted). But the Court noted that "long-recognized and very substantial concerns support the protection of jury deliberations from intrusive inquiry." *Id.* at 127.

Drawing from the common-law cases, the Court noted that these interests include promoting "full and frank discussion in the jury room," ensuring "jurors' willingness to return an unpopular verdict," *Tanner*, 483 U.S. at 120, preventing "harassment of former jurors by losing parties as well as the possible exploitation of disgruntled or otherwise badly-motivated ex-jurors," *id.* at 124, the protection of finality, *ibid.*, and preserving "the community's trust in a system that relies on the decisions of laypeople," *id.* at 121. The Court further noted that even when jurors' testimony concerning their deliberations is disallowed, "Sixth Amendment interests in an unimpaired jury * * * are protected by several aspects of the trial process," including voir dire, the ability of fellow jurors to observe each other and report inappropriate conduct before verdict, and the opportunity for impeachment with nonjuror evidence. *Id.* at 127. Taking these

considerations together, the Court found no constitutional violation from application of Rule 606(b). *Ibid.*

The Court reaffirmed that analysis in *Warger*. The petitioner in *Warger* sought to offer evidence of statements during jury deliberations to prove that he was denied his right to an impartial jury—there, on the ground that statements during deliberations established that a juror had "deliberately lied during *voir dire* about her impartiality and ability to award damages." 135 S. Ct. at 524.[1] This Court recognized that "[t]he Constitution guarantees both criminal and civil litigants a right to an impartial jury," *id.* at 528, but nevertheless held that Rule 606(b) could constitutionally bar the use of statements during jury deliberations to establish a violation of that right. As in *Tanner*, the Court emphasized, "a party's right to an impartial jury remains protected despite Rule 606(b)'s removal of one means of ensuring that jurors are unbiased." *Warger*, 135 S. Ct. at 529. While declining to decide whether there were "cases of juror bias so extreme that * * * the usual safeguards * * * are not sufficient to protect the integrity of the process," *id.* at 529 n.3, the Court found no constitutional violation on the facts before it.

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[1] The Constitution requires reversal of a verdict when a juror lies about a material matter in voir dire, if honest answers would have required that the juror be struck for cause. *McDonough Power Equip., Inc.* v. *Greenwood*, 464 U.S. 548, 556 (1984).

B. Rule 606(b) May Be Applied To Foreclose Impeachment Of Jury Verdicts With Statements Made In Deliberations In Cases In Which Litigants Seek to Prove Racial Bias

The analysis in *Tanner* and *Warger* controls here. Those cases establish that the rules generally barring jurors from testifying about statements in deliberations serve important public interests. And they establish that the right to an impartial jury can be protected through other safeguards. Because the public interests that undergird no-impeachment rules are present here, and the alternative mechanisms for safeguarding an impartial jury are also present, this Court's analysis requires the conclusion that Rule 606(b) may be constitutionally applied when a litigant's Sixth Amendment claim is one pertaining to racial bias.

1. The public interests underlying Rule 606(b) are present when the rule is applied to foreclose inquiry into deliberations to determine whether a juror was racially prejudiced

For hundreds of years, courts and legislatures have concluded that weighty public interests are served by barring the use of evidence from jury deliberations in order to impeach verdicts. These public interests are fully present when a litigant seeks to offer evidence of racially prejudiced statements in jury deliberations—just as when a litigant seeks to offer evidence from deliberations to establish other types of juror partiality or misconduct.

a. Barring impeachment of jury verdicts with accounts of what was said in jury deliberations serves the public interest in "full and frank discussion in the jury room," which would "be undermined by a barrage

of postverdict scrutiny of juror conduct." *Tanner*, 483 U.S. at 120-121. This Court has recognized that interest for more than a century. *McDonald* v. *Pless*, 238 U.S. 264, 267-268 (1915). And Congress emphasized that interest when it adopted Rule 606(b) as promulgated by this Court, see *Tanner*, 483 U.S. at 122—a rule that barred impeachment of verdicts with evidence from deliberations in all cases, except those falling under the longstanding common-law exceptions for extraneous influences. *Senate Report* 14 ("[C]ommon fairness requires that absolute privacy be preserved for jurors to engage in the full and free debate necessary to the attainment of just verdicts. Jurors will not be able to function effectively if their deliberations are to be scrutinized in post-trial litigation.").

The public interest in ensuring full and frank jury discussion by shielding deliberations is furthered in the same way whether a litigant seeks to introduce evidence to establish racial bias; intoxication, *Tanner*, 483 U.S. at 121; the use of a coin-flip to decide a verdict, *Vaise* v *Delaval*, (1785) 99 Eng. Rep. 944, 944 (K.B.); or a deal to convict some defendants in exchange for acquitting others, *Hyde* v. *United States*, 225 U.S. 347, 383-384 (1912). Indeed, full and fair debate is most likely to be chilled when jurors may reasonably fear that legitimate, honest, and unprejudiced expressions will be confused with the form of misconduct that would be made the subject of post-trial impeachment inquiries. Post-trial inquiries based on claims asserting racially prejudiced statements in deliberations may be particularly chilling—more so than inquiries into drinking or drug use or arbitrary decision-making methods like coin-flips. That is because full and fair deliberations may some-

times appropriately involve discussion of race—for instance, when claims of discriminatory conduct are directly or indirectly at issue. While racial prejudice in such conversations is always improper, jurors engaged in heated and sensitive discussions in cases touching on racial discrimination may reasonably fear that even unprejudiced expressions could be misunderstood as reflecting bias.

Indeed, the likelihood of chilling legitimate debate through post-trial inquiries is enhanced by the extraordinary opprobrium that petitioner acknowledges attaches to expressions of racial prejudice. See, *e.g.*, Pet. Br. 27. Given that opprobrium, jurors are more likely to be concerned that they will be mistakenly accused of racism in post-verdict hearings than that they will be mistakenly accused of being biased in favor of tort defendants, for example. *Warger*, 135 S. Ct. at 524. And to the extent that jurors remain silent or guarded, the exception petitioner seeks will produce the harms to deliberations that Rule 606(b) seeks to avoid.

Petitioner raises no challenge to the interest in full and fair debate that presents grounds specific to racial prejudice; his arguments instead amount to quarrels with the hundreds of years of judicial and legislative judgments underlying the common-law approach. Petitioner first suggests (Br. 34) that the interest in ensuring full and fair debate is not implicated in cases of racial bias because "there is no valid interest in creating breathing space for jurors to argue that a defendant should be convicted because of her race." But the interest served by Rule 606(b) is never an interest in creating breathing space for prejudice or misconduct. For instance, barring testimony about

other forms of partiality, *Warger*, 135 S. Ct. at 524, intoxication, *Tanner*, 483 U.S. at 121, or use of arbitrary decision-making methods, *e.g.*, *Vaise*, 99 Eng. Rep. at 944, does not reflect a policy of condoning such conduct. Instead, the application of Rule 606(b) with respect to such claims is designed to safeguard legitimate deliberations against chilling effects. The same is true of the application of Rule 606(b) here.

Petitioner also suggests (Br. 34-35) that hearings concerning whether racial bias existed in the jury room are unlikely to deter legitimate deliberations because statements in deliberations can be disclosed through the narrow class of impeachment inquiries allowed under Rule 606(b) and through jurors' statements to nonjudicial sources. But this Court has long recognized in cases such as *Tanner*, *McDonald*, and *Hyde* that an interest in full and fair debate is served by the common-law rule notwithstanding its narrow extraneous-influence exception and the possibility of disclosures in non-judicial forums. Indeed, petitioner's argument about other avenues for disclosure was pressed by the petitioner in *Warger* two years ago, where the Court nevertheless rejected a constitutional exception to the common-law rule safeguarding juror deliberations. 135 S. Ct. at 528.

b. The limits in Rule 606(b) also protect against harassment of jurors and against post-verdict jury tampering. *Tanner*, 483 U.S. at 119-120; *McDonald*, 238 U.S. at 268; see *Senate Report* 13. Opening the door for invalidation of verdicts on the ground that a juror made statements reflecting racial prejudice would create the same incentive for tampering and harassment as opening the door for invalidation based on alleged misconduct such as the pro-defendant bias

in *Warger*, arbitrary decision-making methods in *McDonald* and *Hyde*, and drinking and drug use in *Tanner*.

Petitioner's arguments to the contrary are all arguments that could have just as easily been made in cases like *Tanner* and *Warger*. Petitioner first argues (Br. 36) that Rule 606(b) does not genuinely serve the interest in preventing tampering and harassment because professional responsibility rules exist as an alternative safeguard against such conduct. But professional responsibility rules and the common-law evidentiary limits work hand in hand. Many jurisdictions—including about two-thirds of federal districts—have rules that prohibit attorneys from contacting jurors except upon prior permission of the court (which can often be granted only based on a showing of cause). App. A, *infra.*, 1a-8a. Rule 606(b) reinforces these rules, ensuring that convicted defendants and losing civil litigants who might have incentive to violate rules barring juror contact cannot benefit from violations. Petitioner's proposed constitutional rule, moreover, would be difficult to reconcile with these limits on juror contact, because it would mandate the admission of evidence that litigants would commonly be barred from even attempting to acquire.

The common-law no-impeachment rule is at least as important in jurisdictions that allow post-trial contact with jurors—again by removing the incentive to harass and tamper with jurors during any contact. Petitioner suggests (Br. 36) that the common-law rule has little value in such jurisdictions because attorneys have incentive to contact jurors based on interests in "professional development" and "curiosity" regardless of whether no-impeachment rules exist. But while

"professional development" and "curiosity" may prompt some lawyers to talk to jurors, those motives provide no reason for attorneys or losing parties to tamper with jurors or to persist in unwanted contact with those who do not want to talk to counsel.

Petitioner finally argues (Br. 37) that courts and legislators have simply been wrong to conclude that tampering or harassment "is a problem" in the first place, asserting that no "discernible harassment effect" exists in jurisdictions that do not adhere to Rule 606(b). But petitioner cites no data undercutting the common-sense inference that reducing incentives for harassment and tampering will reduce the frequency of that misconduct. And the judgment of courts and legislatures has been that broader impeachment rules do encourage harassment and tampering. See, *e.g.*, *Tanner*, 483 U.S. at 123; *Senate Report* 13-14.

c. No-impeachment rules also serve finality. New avenues for challenging final judgments upset settled expectations, consume societal resources, and risk "degrad[ng] the prominence of the trial itself" by undercutting incentives to promptly identify misconduct. *Engle* v. *Isaac*, 456 U.S. 107, 127 (1982). These concerns are heightened by the reality that accurate adjudication is hindered by the passage of time. *Id.* at 127-128 (emphasizing strong finality interests where "[p]assage of time, erosion of memory, and dispersion of witnesses" may hinder proceedings).

This Court's analysis in *Dietz* v. *Bouldin*, 136 S. Ct. 1885 (2016), confirms the hazards of post-trial inquiries into what occurred in the jury room "days, weeks, or months after the verdict," *Tanner*, 483 U.S. at 120. See *Dietz*, 136 S. Ct. at 1894. Once jurors "tak[e] off their juror 'hats' and return[] to their lives," this

Court emphasized, they "may begin to forget key facts" surrounding the case. *Ibid.* Moreover, jurors may face hostile public reaction, disappointment from friends or family, and anger from victims or defendants that lead them to "begin to reconsider their decision." *Ibid.* Such jurors may second-guess the motives behind their fellow jurors' decisions in a way that influences their inevitably fading recollections of what was said. And even jurors who experience no second thoughts may "make inaccurate statements to avoid a confrontation, to disassociate themselves from what is perceived to be an unpopular verdict, or simply to escape from the" presence of a dissatisfied attorney, litigant, or community member. James W Diehm, *Impeachment of Jury Verdicts:* Tanner v. United States *and Beyond*, 65 St. John's L. Rev. 389, 398-399 (1991).

Petitioner contends (Br. 38-39) that application of Rule 606(b) does not serve significant finality interests because Rule 606(b) by its terms contains exceptions for extraneous influences and clerical errors, and because the exception he proposes is narrow. Those contentions provide no basis for distinguishing *Tanner*'s analysis of finality interests. Congress had enacted the extraneous-influence and clerical-error exceptions to Federal Rule of Evidence 606(b) by the time the Court decided *Tanner*, and the exception that the petitioners in *Tanner* sought concerning drunken and impaired jurors could also be described as narrow. Yet this Court recognized finality as an important interest served by application of Rule 606(b). 483 U.S. at 120.

d. Finally, *Tanner* concluded that opening up jury verdicts to further scrutiny based on credibility con-

tests months or years after the fact undermines "the community's trust in a system that relies on the decisions of laypeople." 483 U.S. at 121. Petitioner's argument that this interest is not present is again irreconcilable with this Court's decisions. Petitioner asserts there is no risk to public confidence from opening up a new avenue of post-verdict scrutiny because "[t]he populace does not expect jurors invariably to behave properly" (Br. 15) and because public confidence in the jury system would be diminished by "turn[ing] a blind eye when evidence shows that jury deliberations were tainted by racial bias" (Br. 44). But these arguments were equally applicable in *Tanner*, where application of Rule 606(b) likewise barred evidence of serious misconduct that would undermine the validity of a verdict. *Tanner* nevertheless recognized that opening new avenues for contested hearings about what was said or done in deliberations to attack a verdict would undercut public confidence rather than enhance it.

2. Pre-trial, in-trial, and post-trial mechanisms are available to safeguard against racial bias

In twice upholding applications of Rule 606(b) against constitutional challenge, this Court has emphasized that while Rule 606(b) forecloses one avenue of identifying bias or misconduct in order to further important public interests, other mechanisms are available before, during, and after trial to protect the right to a fair and impartial jury. *Warger*, 135 S. Ct. at 529; *Tanner*, 483 U.S. at 127. Those safeguards are equally available—and in some cases more available—to address racial prejudice than other forms of bias and misconduct.

a. This Court emphasized the importance of voir dire as a mechanism for safeguarding the right to a fair and impartial jury in *Tanner*, 483 U.S. at 127, and *Warger*, 135 S. Ct. at 529. Voir dire has long been recognized as especially important in safeguarding against racial bias. This Court has thus (1) required that defendants be allowed voir dire concerning racial bias in some cases; (2) required an opportunity for such questioning as a matter of federal supervisory power in other cases; and (3) recommended voir dire on this topic whenever requested by a criminal defendant. *Turner* v. *Murray*, 476 U.S. 28, 36-37 (1986) (requiring opportunity to conduct voir dire on racial attitudes for defendants charged with interracial capital offenses); *Rosales-Lopez* v. *United States*, 451 U.S. 182, 192 (1981) (plurality opinion) (requiring opportunity for voir dire concerning racial attitudes as a matter of federal supervisory power for violent offenses in which the defendant is of one race and the victim is of another); *Ham* v. *South Carolina*, 409 U.S. 524, 527 (1973) (requiring opportunity for such questioning in certain other cases); see *Ristaino* v. *Ross*, 424 U.S. 589, 597 n.9 (1976) ("[T]he wiser course generally is to propound appropriate questions designed to identify racial prejudice if requested by the defendant."). These decisions requiring opportunities for race-related voir dire in many cases and recommending opportunities for such questioning as a general matter reflect the understanding that—contrary to petitioner's view—voir dire is a critical tool for identifying racially prejudiced jurors.

Practitioners have likewise focused on voir dire as a mechanism for identifying racial prejudice. The strategies that practitioners have developed go well

beyond asking panel members directly whether they harbor prejudices—the method that petitioner disparages (Br. 35) on the ground that it "might be viewed as insulting" (citation omitted).[2] Strategies include "shar[ing] a brief example about a judgment shaped by a racial stereotype," to "give prospective jurors 'permission to admit their own [biased] thinking,'" and "help to begin a conversation in which potential jurors are comfortable discussing racial bias." Alyson A. Grine & Emily Coward, *Raising Issues of Race in North Carolina Criminal Cases* 8-14 (2014), http://defendermanuals.sog.unc.edu/race/8-addressing-race-trial (citation omitted; second set of brackets in original). Another technique involves use of open-ended questions that elicit views and reactions about specific past experiences. *Id.* at 8-15. Yet another is to use multiple choice and free-response questions on written questionnaires that provide jurors with a confidential forum to express their views. *Id.* at 8-17.

Petitioner nevertheless urges this Court to discount voir dire (Br. 24) because while his attorneys were given a free hand to conduct questioning on

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[2] See, *e.g.*, Jeff Robinson & Jodie English, *Confronting the Race Issue in Jury Selection*, The Advocate 57-62, May 2008, http://apps.dpa.ky.gov/library/advocate/pdf/2008/adv050108.pdf (more than 75 model questions); see also Alyson A. Grine & Emily Coward, *Raising Issues of Race in North Carolina Criminal Cases* 8-18 to 8-22 (2014), http://defendermanuals.sog.unc.edu/race/8-addressing-race-trial (numerous questions and strategies); Wisconsin State Pub. Defender's Office, *Talking to Juries about Race: Building Theories & Themes Around Racial Issues at Trial*, http://wispd.org/attachments/article/254/Building%20Theories%20and%20Themes%20around%20Racial%20Issues%20at%20Trial-%20Talking%20to%20Juries%20about%20Race.pdf (similar model questions).

racial attitudes, trial courts have "broad discretion" over the scope of such questioning. But trial courts *always* have broad discretion to limit voir dire questioning. This Court has nevertheless treated voir dire as an important safeguard against partiality and misconduct in upholding the application of Rule 606(b). Those decisions reflect the fact that, notwithstanding trial courts' discretion as to the manner and method of questioning, courts must allow voir dire adequate to enable the identification and removal of "prospective jurors who will not be able to impartially follow the court's instructions and evaluate the evidence" due to bias or other impediments. *Rosales-Lopez*, 451 U.S. at 188 (plurality opinion). And this Court's reliance on voir dire also reflects practical realities. The overwhelming majority of States permit attorneys to question jurors directly. See Hon. Gregory E. Mize et al., *The State-of-the-States Survey of Jury Improvement Efforts: A Compendium Report* 27-28 (2007), http://www.ncsc-jurystudies.org/~/media/Microsites/Files/CJS/SOS/SOSCompendiumFinal.ashx (identifying 41 States). And in the federal system, where "judge-conducted voir dire is the norm," *id.* at 27, litigants must be allowed to submit questions for consideration, Fed. R. Crim. P. 24(a); Fed. R. Civ. P. 47(a), and judges have been exhorted to permit questioning concerning race if requested by the defendant, even when it is not constitutionally required, *Ristaino*, 424 U.S. at 597 n.9.

Petitioner also argues that voir dire is an ineffective safeguard against racial bias because questioning in this area might raise "an issue defense counsel does not want to highlight." Br. 25 (citations omitted). Of course, counsel might hesitate to ask about numerous

subjects for fear of giving rise to prejudice through questioning itself. For instance, counsel might hesitate to ask jurors whether they would be influenced by a civil defendant's insurance coverage or to ask whether jurors would interpret one criminal defendant's guilty plea to implicate another defendant. Cf. Fed. R. Evid. 606(b) advisory committee's note (providing these examples of inappropriate jury-room considerations concerning which Rule 606(b) would bar inquiry).

But insofar as petitioner is suggesting that counsel may not "want to highlight" race because inquiries about racial bias might give rise to racial prejudice, research indicates the opposite. Studies indicate that questioning concerning racial attitudes reduces the likelihood that jurors will act on implicit prejudices. See Samuel R. Sommers & Phoebe C. Ellsworth, Symposium, *How Much Do We Really Know About Race and Juries? A Review of Social Science Theory and Research*, 78 Chi.-Kent L. Rev. 997, 997-1011 (2003); see also Regina A. Schuller et al., *The Impact of Prejudice Screening Procedures on Racial Bias in the Courtroom*, 33 Law & Hum. Behav. 320, 326 (2009). Indeed, recent research indicates that making race salient—as voir dire questioning does—reduces prejudice even in individuals who harbor explicit racial biases. Ellen S. Cohn et al., *Reducing White Juror Bias: The Role of Race Salience and Racial Attitudes*, 39 J. Applied Soc. Psychol. 1953 (2009).

Petitioner finally asserts (Br. 26-27) that social opprobrium attached to racist views makes direct questioning ineffective at identifying those with racist attitudes. But petitioner's attempt to discount voir dire on this basis runs contrary to this Court's long-

standing treatment of voir dire as a constitutionally significant safeguard with respect to racial bias. And it fails to account for techniques beyond direct questions in front of the venire that are designed—when paired with the sanctity of jurors' oaths and the penalties of perjury and contempt—to elicit truthful answers to sensitive questions. See p. 25-26, *supra*; see also Resp. Br. 26 (noting that practice guides on which petitioner himself relies recommend a variety of voir dire techniques for probing bias). Given the strategies that courts and attorneys have developed to identify prejudiced jurors, petitioner offers little reason to imagine that, contrary to this Court's precedents, voir dire is particularly ineffective in identifying jurors who are racially biased.

b. In upholding applications of Rule 606(b) against Sixth Amendment challenges, this Court has emphasized that the right to a fair and impartial jury is also protected by additional safeguards during trial. *Warger*, 135 S. Ct. at 529; *Tanner*, 483 U.S. at 127. Those safeguards are just as effective against racial bias as they are against other forms of jury misconduct to which Rule 606(b) has long been applied.

i. The foremost safeguard against jury misconduct during trial is the ability of jurors to call the court's attention to prejudicial statements or other misconduct before a verdict is entered. There is no reason to treat this in-trial safeguard as less effective with respect to racial bias than with respect to other forms of prejudice or misconduct—such as the pro-defendant bias alleged in *Warger*, the quotient-verdict method alleged in *McDonald*, and the coin-flip decision-making in *Vaise*.

Petitioner hypothesizes (Br. 22) that jurors might be less likely to report racial bias than other forms of misconduct because "jurors may not realize that racially biased statements made during deliberations are legally impermissible." But review of jury instructions reveals that the opposite is true: Jurors are likely to be especially aware that decision-making based on bias is prohibited, because jurisdictions overwhelmingly provide express instructions on this point. The leading federal instructions specify that the jury must perform its duties "without bias or prejudice to any party." 1 Leonard B. Sand, et al., *Modern Federal Jury Instructions: Criminal* ¶ 2.01, Instruction 2-3, at 2-8 (2016); see *id.* ¶ 2.01, Instruction 2-11, at 2-22 ("It would be improper for you to consider * * * any personal feelings you may have about the defendant's race."). Circuit instructions follow suit. App. B, *infra*, 9a. The pattern instructions of 42 States also contain specific warnings on prejudice. *Id.* at 10a-13a. And States that do not specifically warn about prejudice typically tell jurors to reach their verdict fairly, impartially, or based only on the facts and law. *Id.* at 14a. These instructions are reinforced by what petitioner acknowledges (Br. 27) are exceptionally strong social norms against racial biases—norms that make such bias particularly likely to spur outrage and action.

Petitioner next asserts (Br. 23) that jurors are unlikely to report bias during trial because making such reports could cause "social anxiety" or "embarrassment," and because jurors are unlikely to want to "stir[] unwanted conflict." Reporting to a trial court that another juror is disregarding the court's instructions may indeed cause social tension. But this is true

of all types of reporting of misconduct by jurors. It could be "embarrass[ing]" and "stir[] unwanted conflict" to report a fellow juror's drug or alcohol use as in *Tanner*, or to report comments evidencing that a fellow juror lied in voir dire as in *Warger*, yet this Court concluded that reporting by fellow jurors is a significant safeguard with respect to those forms of juror misconduct.

Finally, were there doubt about whether jurors would report racial bias during trial, it would be resolved by the many reported cases in which jurors have done just that. These include respondent's examples (Br. 31-32 n.10), and many others, *e.g.*, *United States* v. *Sotelo*, 97 F.3d 782, 794-979 (5th Cir.), cert. denied, 519 U.S. 1045 (1996), 519 U.S. 1135, and 520 U.S. 1149 (1997); *Turner* v. *Pollard*, No. 13-CV-731, 2014 WL 5514169, at *2 (E.D. Wis. Oct. 31, 2014); *Love* v. *Yates*, 586 F Supp. 2d 1155, 1184-1188 (N.D. Cal. 2008); *Bryant* v. *Mattel, Inc.*, No. 04-CV-09049, 2008 WL 3367605 (C.D. Cal. Aug. 8, 2008); *People* v. *Wilson*, 187 P.3d 1041, 1076-1089 (Cal. 2008); *People* v. *Stevens*, No. A119073, 2012 WL 758035, at *2-4, *13-16 (Cal. Ct. App. Mar. 9, 2012); *State* v. *Miera*, 966 P.2d 1115, 1115 (Idaho Ct. App. 1998) (per curiam); *State* v. *Jones*, 29 So. 3d 533, 535 (La. Ct. App. 2009). These decisions confirm that jurors' reporting of misconduct during trial can protect against racially biased conduct in the jury room—just as it can protect against other forms of bias and misconduct that are contrary to the Sixth Amendment.

ii. Courts' ability to uncover misconduct during trial through juror reporting is supplemented by their ability to receive reports from those outside the jury —such as attorneys, observers, and court staff.

Warger, 135 S. Ct. at 529; *Tanner*, 483 U.S. at 127. Of course, non-jurors will rarely have a window into displays of bias or misconduct occurring within the jury room itself—whether the conduct in question is coin-flip decision-making, *Vaise*, *supra*, use of a quotient-verdict method, *McDonald*, *supra*, expressions of pro-defendant bias, *Warger*, *supra*, or expressions of racial prejudice. But it is far from unheard-of for jurors with prejudiced reactions to events during trial to express them outside the jury room—as demonstrated by cases in respondent's brief (Br. 35), and numerous others, *e.g.*, *Thompson* v. *Quarterman*, 629 F Supp. 2d 665, 676-679 (S.D. Tex. 2007); *United States* v. *Patterson*, No. 04-CR-705-1, 2007 WL 1438658, at *4-5, *21-23 (N.D. Ill. May 15, 2007), aff'd 397 Fed. Appx. 209 (7th Cir. 2010); *Jimenez* v. *Heyliger*, 792 F. Supp. 910, 916-919 (D.P.R. 1992); *People* v. *Jones*, 475 N.E.2d 832, 836-837 (Ill. 1985); *State* v. *Evans*, 756 N.W.2d 854, 862-871 (Minn. 2008); *State* v. *Varner*, 643 N.W.2d 298, 302-305 (Minn. 2002). This Court has accordingly treated reporting during trial from outside observers as one of the safeguards of the right to a fair and impartial jury even when addressing claims of partiality relating to juror attitudes. *Warger*, 135 S. Ct. at 529.

c. Finally, this Court has emphasized in upholding applications of Rule 606(b) that a litigant may seek to impeach a verdict after trial based on a Sixth Amendment claim, so long as its challenge is based on "nonjuror evidence of misconduct." *Tanner*, 483 U.S. at 127. If anything, it is far more likely that nonjuror evidence of racial biases will exist than, for example, nonjuror evidence that a juror would resort to coin-

flipping or other arbitrary decision-making methods in the jury room.

A juror who expresses racial bias in the jury room will often express such bias outside the jury room as well. And when a juror's statements outside the courtroom indicate that he misrepresented his ability to be fair and impartial during voir dire, a litigant may bring a Sixth Amendment challenge based on that evidence. *McDonough Power Equip., Inc.* v. *Greenwood*, 464 U.S. 548, 556 (1984) (explaining that a litigant is entitled to a new trial when a litigant "demonstrate[s] that a juror failed to answer honestly a material question on *voir dire*, and then further show[s] that a correct response would have provided a valid basis for a challenge for cause"). Petitioner offers no reason to believe that this type of non-juror evidence is peculiarly unlikely to be available for racial prejudice.

Petitioner instead suggests (Br. 28-29) that nonjuror evidence will not help safeguard against racial bias because courts have interpreted Rule 606(b) as barring "non-jurors from testifying to statements uttered by jurors even when made outside of the courthouse." Br. 28. But Rule 606(b) bars only nonjuror testimony that recounts statements jurors made about matters or statements "occurring during the course of the jury's deliberations," or about jurors' reasoning or mental processes in the deliberations themselves. Colo. R. Evid. 606(b); see, *e.g.*, *United States* v. *Voigt*, 877 F.2d 1465, 1469 (10th Cir.), cert. denied, 493 U.S. 982 (1989); *Fulghum* v. *Ford*, 850 F.2d 1529, 1535 (11th Cir. 1988), cert. denied, 488 U.S. 1013 (1989). The rule therefore does not generally prevent parties from using nonjuror evidence to es-

tablish that a juror harbored racist beliefs, and therefore should have been struck for cause. See, *e.g.*, *United States* v. *Henley* 238 F.3d 1111, 1120 (9th Cir. 2001), abrogated on other grounds by *Warger*, 135 S. Ct. 524.

3. Because the Sixth Amendment forbids all forms of partiality and misconduct, no race-specific rule is appropriate

The Sixth Amendment does not support departing from the framework set out in *Tanner* when the type of juror partiality alleged is racial bias, rather than other misconduct or prejudice. That Amendment, on which petitioner's claim rests, guarantees every defendant the right to a fair and impartial jury. U.S. Const. Amend VI. That is, it guarantees "a jury capable and willing to decide the case solely on the evidence before it." *McDonough*, 464 U.S. at 554 (citation omitted). The Sixth Amendment is thus violated when jurors decide a case using any criterion other than the law and evidence—from prejudice relating to race, to prejudice for or against particular classes of litigants, *Warger*, *supra*, to arbitrary decision-making methods like drawing lots, *Vaise*, *supra*, or trading a conviction of one defendant for an acquittal of another, *Hyde*, *supra*. The Sixth Amendment does not support treating some litigants differently from others on the theory that different prejudices or arbitrary decision-making criteria are more or less consistent with the Sixth Amendment's commands.

The decisions under the Equal Protection Clause that petitioner invokes (Br. 43) in urging this Court to create "special categories of bias" under the Sixth Amendment are inapposite. Under the Equal Protection Clause, States are generally forbidden from mak-

ing decisions based on classifications subject to heightened scrutiny. For instance, the Equal Protection Clause is violated when a litigant makes peremptory challenges based on race, *Batson* v. *Kentucky*, 476 U.S. 79, 85-98 (1986), or gender, *J.E.B.* v. *Alabama*, 511 U.S. 127, 129 (1994), but no violation occurs when a litigant uses some other criterion, such as when a litigant strikes "any group or class of individuals normally subject to 'rational basis' review," *id.* at 143. That framework differs from the distinct protections of the Sixth Amendment, which bar decisionmaking based on *any* bias, prejudice, or arbitrary method. Given the Sixth Amendment's broad protections against any bias or prejudice, petitioner errs in counseling different analyses under that provision depending on the type of partiality that a litigant asserts.

CONCLUSION

The judgment of the Colorado Supreme Court should be affirmed.

Respectfully submitted.

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APPENDIX A

Federal District Court Rules Barring Litigants From Contacting Jurors Following Trial Without Judicial Permission Or Barring Jurors From Disclosing Deliberations

Alabama:	M.D. Ala. Local Rule 47.1 (permission from judge)
	S.D. Ala. Local Rule 47(e) (permission from judge following notice to opponent and showing of good cause)
Alaska:	D. Alaska Local Civil Rule 83.1(h) (permission from judge); see D. Alaska Local Criminal Rule 1.1(b) (specifying that civil rules apply in criminal proceedings where appropriate)
Arizona:	D. Ariz. Local Civil Rule 39.2(b) & Local Criminal Rule 24.2 (permission from judge within time for moving for new trial, based upon good cause and review of proposed interrogatories)
Arkansas:	E.D. & W.D. Ark. Local Rule 47.1 (permission from judge)
Colorado:	D. Colo. Local Civil Rule 47.2 & Local Criminal Rule 24.1 (permission from judge)

Connecticut:	D. Conn. Local Rule 83.5 (barring jurors from disclosing deliberations of jury, votes of jury, or actions or comments of other jurors, except that jurors must report extraneous information, outside influence, or clerical mistakes)
Delaware:	D. Del. Local Civil Rule 47.2 (permission from judge)
District of Columbia:	D.D.C. Local Civil Rule Columbia 47.2(b); Local Criminal Rule 24.2(b) (permission of judge, based on showing of good cause after jury discharge)
Florida:	M.D. Fla. Local Rule 5.01(d) (permission from judge based on motion explaining grounds for belief that verdict is subject to challenge)
	S.D. Fla. Local Rule 11.1(e) (permission from judge based on showing of good cause)
Georgia:	N.D. Ga. Local Civil Rule 47.3 & Local Criminal Rule 47.3 (permission from judge)
	M.D. Ga. Local Civil Rule 48.3 & Local Criminal Rule 31.1 (permission from judge)

	S.D. Ga. Local Rule 83.8 (permission from judge)
Illinois:	N.D. Ill. Local Civil Rule 48.1 & Local Criminal Rule 31.1 (permission from judge)
	C.D. Ill. Local Rule 47.2(2) (permission from judge)
	S.D. Ill. Local Rule 53.1 (permission from judge)
Indiana:	N.D. Ind. Local Civil Rule 47-2 (permission from judge and notice to other parties)
	S.D. Ind. Local Rule 47-2 (permission from judge; showing of good cause required in criminal cases)
Iowa:	N.D. & S.D. Iowa Local Rule 47; Local Criminal Rule 24.1 (permission from judge)
Kansas:	D. Kan. Local Rule 47.1 (permission from judge; jurors may not disclose "the deliberations of the jury")
Kentucky:	E.D. Ky. Local Civil Rule 47.1(a); Local Criminal Rule 24.1 (permission from judge)
	W.D. Ky. Local Civil Rule 47.1(a); Local Criminal Rule 24.1 (permission from judge)

Louisiana:	E.D. La. Local Civil Rule 47.5; Local Criminal Rule 23.2 (permission from judge)
	M.D. La. Local Civil Rule 47(e); Local Criminal Rule 24 (permission from judge based on showing of good cause; jurors prohibited from disclosing jury deliberations, evidence of improprieties in jury deliberations, or the specific vote of any juror other than the juror being interviewed)
	W.D. La. Local Rule 47.5 (permission from judge based on showing of good cause; jurors prohibited from disclosing jury deliberations, evidence of improprieties in jury deliberations, or the specific vote of any juror other than the juror being interviewed)
Maryland:	D. Md. Local Rule 107(16) (permission from judge)
Mississippi:	N.D. & S.D. Miss. Local Civil Rule 48 (permission from judge based on showing of good cause); see N.D. & S.D. Miss. Local Criminal Rule 1 (specifying that civil rules apply in criminal proceedings where appropriate)

Missouri:	E.D. Mo. Local Rule 47-7.01(B)(1) (permission from judge)
Montana:	D. Mont. Local Civil Rule 48.1; Local Criminal Rule 24.2 (permission from judge within the time for moving for a new trial, based on showing of good cause and review of proposed interrogatories)
New Hampshire:	D.N.H. Local Rule 47.3 (permission from judge to be granted only "in extraordinary circumstances and for good cause shown")
New Jersey:	D.N.J. Local Civil Rule 47.1(e); Local Criminal Rule 24.1(g) (permission from judge based on showing of good cause)
North Carolina:	W.D.N.C. Local Civil Rule 47.1(D) (permission from judge based on showing of good cause)
Ohio:	S.D. Ohio Local Rule 47.1 (permission from judge)
Oklahoma:	E.D. Okla. Local Rule 47.1 (permission from judge)
	N.D. Okla. Local Civil Rule 47.2; Local Criminal Rule 24.2 (permission from judge)

	W.D. Okla. Local Civil Rule 47.1; Local Criminal Rule 53.3 (permission from judge)
Oregon:	D. Or. Local Civ P 48-2 (permission from judge)
Pennsylvania:	E.D. Pa. Criminal Rule 24.1(c) (permission from judge)
	M.D. Pa. Local Rule 83.4 (permission from judge)
Puerto Rico:	D.P.R. Local Civil Rule 47(c)-(d); Local Criminal Rule 124(e) (communication barred unless under supervision of the court)
Rhode Island:	D.R.I. Local Civil Rule 47(d); Local Criminal Rule 24(g) (permission from judge)
South Dakota:	D.S.D. Local Civil Rule 47.2 & Local Criminal Rule 24.2 (permission from judge)
Tennessee:	E.D. Tenn. Local Rule 48.1 (permission from judge)
	M.D. Tenn. Local Rule 39.01(f)(2) (permission from judge)
	W.D. Tenn. Local Rule 47.1(e)-(f) (permission from judge based on motion that states ground and purpose, except in cases of mistrial)

Texas:	E.D. Tex. Local Civil Rule 47(b); Local Criminal Rule 24(a)(2) (permission from judge)
	N.D. Tex. Local Civil Rule 47.1; Local Criminal Rule 24.1 (permission from judge)
	S.D. Tex. Local Rule 47 (permission from judge)
Vermont:	D. Vt. Local Rule 83.5 (permission from judge)
Virgin Islands:	D. V.I. Local Rule 47.1 (permission from judge)
Virginia:	E.D. Va. Local Civil Rule 47(c); Local Criminal Rule 24(c) (permission from judge, based on showing of good cause)
Washington:	E.D. Wash. Local Rule 47.1(d) (permission from judge)
	W.D. Wash. Local Civil Rule 47(d); Local Criminal Rule 31(e) (permission from judge)
West Virginia:	N.D. W. Va. Local Rule Gen. Practice 47.01 (permission from judge)
	S.D. W. Va. Local Rule Civ. P 48.1; Local Rule Crim. P. 31.1 (permission from judge, based on showing of good cause)

Wisconsin:	E.D. Wis. Gen. Local Rule 47(c) (permission from judge, based on showing of good cause)
	W.D. Wis. Local Rule 4 (LR 47.2) (permission from judge)
Wyoming:	D. Wyo. Local Rule 47.2(b)-(c); Local Criminal Rule 24.1(c) (banning jurors from disclosing the deliberations of the jury or the vote of any juror other than the juror being interviewed)

APPENDIX B

1. Pattern Jury Instructions That Advise Jurors To Set Aside Biases And Prejudices

A. Federal Courts

First Circuit:	Pattern Jury Instructions, First Circuit 3.01 (1998)
Third Circuit:	Third Circuit Manual of Modern Jury Instructions–Criminal 3.01 (2015)
Fifth Circuit:	Pattern Jury Instructions, Criminal Cases 1.04 (2015)
Sixth Circuit:	Pattern Criminal Jury Instructions 1.02 (2013)
Seventh Circuit:	Federal Criminal Jury Instructions of the Seventh Circuit 1.01 (2012)
Eighth Circuit:	Manual of Model Criminal Jury Instructions for the District Courts of the Eighth Circuit 3.02 (2014)
Ninth Circuit:	Manual of Model Criminal Jury Instructions for the District Courts of the Ninth Circuit 1.1 (2010)
Tenth Circuit:	Criminal Pattern Jury Instructions (Tenth Circuit) 1.04 (2011)
Eleventh Circuit:	Eleventh Circuit Pattern Jury Instructions 2.1 (Criminal Cases) (2010)

B. State Courts

Alaska:	Alaska Criminal Pattern Jury Instructions 1.07 (2011)
Arizona:	Criminal Revised Arizona Jury Instructions, Preliminary Criminal 2 Duty of Jurors (3d ed. 2014)
Arkansas:	Arkansas Model Jury Instructions—Criminal 101 (2d ed. 2016)
California:	California Jury Instructions —Criminal 1.00, 17.50 (West 2016)
Colorado:	Colorado Jury Instructions—Criminal E:01 (2015)
Connecticut:	Connecticut Judicial Branch Criminal Jury Instructions 2.1-2 (2014)
Delaware:	Pattern Criminal Jury Instructions of the Superior Court of the State of Delaware 2.2 (2016)
Florida:	Florida Standard Jury Instructions in Criminal Cases 3.10 (2015)
Georgia:	2 Georgia Suggested Pattern Jury Instructions—Criminal 1.70.11 (2016)
Hawaii:	Hawai'i Pattern Jury Instructions—Criminal 3.03 (2014)

Idaho:	Idaho Criminal Jury Instructions 104 (2010)
Illinois:	Illinois Pattern Criminal Jury Instructions 1.01 (2014)
Indiana:	Indiana Pattern Jury Instructions (Criminal) Instruction No. 13.1500 (2016)
Louisiana:	17 Louisiana Civil Law Treatise, Criminal Jury Instructions 3.8 (3d ed. 2015)
Maine:	1-6 Maine Jury Instruction Manual 6-2 (2016)
Maryland:	Maryland Criminal Pattern Jury Instructions 2.04 (2d ed. 2013)
Massachusetts:	Massachusetts, Criminal Model Jury Instructions for Use in the District Court, Instruction 2.120 (2009)
Michigan:	Michigan Model Criminal Jury Instructions 3.1 (2004)
Minnesota:	10 Minnesota Practice Series, Jury Instruction Guides—Criminal 1.01 (6th ed. 2016)
Mississippi:	Mississippi Plain Language Model Jury Instructions—Criminal 101 (2012)
Missouri:	Missouri Approved Instructions—Criminal 302.01 (3d ed. 1986)

Montana:	Montana Criminal Jury Instruction, Instruction No. 1-102 (2009)
Nebraska:	Nebraska Jury Instructions—Criminal 1.0 (West 2010)
New Hampshire:	New Hampshire Criminal Jury Instructions—1985, Instruction 1.01
New Jersey:	New Jersey Standard Crim. Jury Instruction, Non 2C Charges, Instructions After Jury Is Sworn (2012)
New Mexico:	New Mexico Uniform Jury Instructions—Criminal 14-101 (2011)
New York:	Charges to Jury and Request to Charge in Criminal Case in New York—Reasonable Doubt (2016)
North Carolina:	North Carolina Pattern Jury Instructions for Criminal Cases 100.25 (2013)
North Dakota:	North Dakota Pattern Jury Instructions—Criminal 1.03 (2016)
Ohio:	2 Ohio Jury Instructions—Criminal 425.35 (West 2016)
Oklahoma:	Oklahoma Uniform Jury Instructions—Criminal 11-6 (2016)

Oregon:	1 Oregon Uniform Criminal Jury Instructions 1005 (2011)
Pennsylvania:	Pennsylvania Suggested Standard Criminal Jury Instructions 7.05 (3d ed. 2016)
South Dakota:	South Dakota Pattern Jury Instructions Criminal 1-17-1 (2015)
Tennessee:	Tennessee Pattern Jury Instructions—Criminal 43.04 (2015)
Texas:	Texas Criminal Pattern Jury Charges—Crimes Against Persons and C2.1 (2011)
Utah:	Model Utah Jury Instructions —Criminal 202 (2d. ed. 2014)
Vermont:	Vermont Model Criminal Jury Instructions CR02-111 (2003)
Washington:	Washington Pattern Jury Instructions—Criminal 1.02 (2014)
West Virginia:	West Virginia Criminal Jury Instructions 4.01 (6th ed. 2003)
Wisconsin:	Wisconsin Jury Instructions —Criminal 50 (2010)
Wyoming:	Wyoming Criminal Pattern Jury Instructions 1.02 (2014)

2. Additional State Courts That Direct Jurors to Reach Their Verdict Fairly, Impartially, or Based Only on the Facts and the Law

Alabama:	Alabama Pattern Jury Instructions—Criminal Proceedings I.2, I.4 (2014)
Iowa:	Iowa Criminal Jury Instructions 100.18 (2013)
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South Carolina:	Anderson's South Carolina Requests to Charge—Criminal 1-1 (2d ed. 20112)
Virginia:	Virginia Model Jury Instructions—Criminal, Instruction No. 2.100 (2015)

APPENDIX C

Federal Rule of Evidence 606(b) provides:

(b) During an Inquiry Into the Validity of a Verdict or Indictment.

(1) Prohibited Testimony or Other Evidence. During an inquiry into the validity of a verdict or indictment, a juror may not testify about any statement made or incident that occurred during the jury's deliberations; the effect of anything on that juror's or another juror's vote; or any juror's mental processes concerning the verdict or indictment. The court may not receive a juror's affidavit or evidence of a juror's statement on these matters.

(2) Exceptions. A juror may testify about whether:

(A) extraneous prejudicial information was improperly brought to the jury's attention;

(B) an outside influence was improperly brought to bear on any juror; or

(C) a mistake was made in entering the verdict on the verdict form.

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IN THE

Supreme Court of the United States

MIGUEL ANGEL PEÑA RODRIGUEZ,

Petitioner,

v.

STATE OF COLORADO,

Respondent.

ON WRIT OF CERTIORARI TO THE COLORADO SUPREME COURT

AMICUS CURIAE BRIEF OF CENTER ON THE ADMINISTRATION OF CRIMINAL LAW IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Federal and state courts often inquire into the validity of jury verdicts—including inquiries into the possibility of juror misconduct—to ensure compliance with the Sixth Amendment right to trial by an impartial jury. However, most states and the federal system have a rule of evidence that generally prohibits the introduction of juror testimony regarding statements made during deliberations. These principles are known as "no-impeachment rules." No-impeachment rules are codified as Federal Rule of Evidence 606(b) and its state analogues; in some states, such rules exist as common-law principles.

In Amicus's view, the question presented is whether an exception to no-impeachment rules should exist for those narrow circumstances where a defendant offers evidence of racial bias to prove a violation of the Sixth Amendment right to an impartial jury.

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Other Authorities

Jane Kirtley, *Keeping Jurors' Lips Sealed*,
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The Center on the Administration of Criminal Law (the "Center") respectfully submits this amicus curiae brief in support of Petitioner in this case.[1]

INTEREST OF AMICUS CURIAE

The Center, based at New York University School of Law,[2] is dedicated to defining and promoting good government practices in the criminal-justice system through academic research, litigation, and formulating public policy. One of the Center's guiding principles in selecting cases to litigate is identifying cases that raise substantial legal issues regarding interpreting the Constitution, statutes, regulations, or policies. The Center supports challenges to practices that raise fundamental questions of defendants' rights or that the Center believes constitute a misuse of government resources in view of law-enforcement priorities. The Center also defends criminal-justice practices where discretionary decisions align with applicable law and standard practic-

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[1] Counsel for all parties have consented to the filing of this amicus curiae brief. No counsel to any party authored this brief in whole or in part, and no person or entity other than Amicus and its counsel made a monetary contribution intended to fund the preparation or submission of this brief.

[2] No part of this brief purports to represent the views of New York University School of Law, or of New York University, if any.

es and are consistent with law-enforcement priorities.

The Center's appearance as amicus curiae in this case is prompted by its belief that the Sixth Amendment right to trial by an impartial jury requires that an exception be made to no-impeachment rules for cases in which defendants offer evidence of racial bias during jury deliberations. The Center believes that protecting defendants' Sixth Amendment rights is necessary for the fair and effective administration of criminal justice. This case, therefore, is important to the Center's mission.

SUMMARY OF ARGUMENT

A rule permitting the impeachment of jury verdicts where racial bias is expressed during deliberations would substantially enhance the administration of criminal justice. This amicus brief demonstrates that rooting out racial bias in jury deliberations would not impose significant practical burdens on the courts. To the extent that such a burden may exist, it is greatly outweighed by the importance both of eradicating racial bias from the justice system and of enhancing the appearance of justice in this critical respect.

In order to ensure compliance with the Sixth Amendment's requirement of trial by an impartial jury, federal and state courts already inquire into the

validity of jury verdicts and deliberations on multiple grounds. There is no practical reason why consideration of racial bias should not be included among the issues affecting impartiality that courts already address—issues that are less pernicious than racial bias.

Indeed, some 20 jurisdictions throughout the country expressly provide for an exception[3] to the no-impeachment rules codified in Federal Rule of Evidence 606(b) and in state analogues.[4] This fact alone

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[3] Some jurisdictions base the exception on the Sixth Amendment. *See, e.g., United States v. Villar*, 586 F.3d 76 (1st Cir. 2009) ("While we agree with the trial court that Rule 606(b) precludes inquiry into juror prejudice, we hold that the court has the discretion to conduct such an inquiry under the Sixth Amendment and the Due Process Clause "). Others apply principles of state law. *See, e.g., State v. Santiago*, 715 A.2d 1, 22 (Conn. 1998) (mandating consideration of racial bias "in the exercise of our inherent supervisory authority over the administration of justice").

[4] Rule 606(b) of the Federal Rules of Evidence provides:

> During an Inquiry Into the Validity of a Verdict or Indictment.
>
> (1) Prohibited Testimony or Other Evidence. During an inquiry into the validity of a verdict or indictment, a juror may not testify about any statement made or incident that occurred during the jury's deliberations; the effect of anything on that juror's or another juror's vote; or any juror's mental processes concerning the verdict or indictment. The court may not receive a juror's affidavit or evidence of a juror's statement on these matters.
>
> (2) Exceptions. A juror may testify about whether:
>
> (A) extraneous prejudicial information was improperly brought to the jury's attention;

demonstrates the practicality of an exception. In those 20 jurisdictions, furthermore, courts have developed protocols to ensure the sound administration of trials and to limit slippery-slope problems that might ensue from inquiry into jury deliberations. Experience in other areas of the law further confirms that courts are well-equipped to address and decide issues of alleged racial bias.

Not only does an exception for racial bias fit easily into the already-routine regime of post-verdict inquiries into pernicious or improper juror influences, but a review of the case law in jurisdictions where the inquiry is permitted shows that racial bias arises infrequently—some 42 times over several decades. *See infra* Point II.C and Appendix A. At the same time, however, courts that have addressed allegations of racial bias have called the jury verdict into question over half the time—a fact that demonstrates the importance of recognizing an exception in order to expunge racial bias that would have gone unremedied were it not for the exception.

The practicality of an exception for racial bias should be dispositive. It is axiomatic that racial bias has no place within the criminal-justice system. For

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(B) an outside influence was improperly brought to bear on any juror; or

(C) a mistake was made in entering the verdict on the verdict form.

FED. R. EVID. 606(b). Most states have analogous rules, either codified or common-law.

that reason, the courts, including this Court, have crafted rules and doctrines to protect defendants from racial bias. Here, where a no-impeachment exception does not pose significant practical difficulties to the justice system, the pernicious influence of racial bias compels the adoption of such an exception.

ARGUMENT

I. THE SIXTH AMENDMENT REQUIRES AN EXCEPTION TO NO-IMPEACHMENT RULES FOR RACIAL BIAS TO ENSURE THE FAIR, CONSISTENT AND EFFECTIVE ADMINISTRATION OF CRIMINAL JUSTICE

The Sixth Amendment compels adoption of an exception to no-impeachment rules in order to ensure that racial discrimination plays no role in the jury process from beginning to end in criminal cases. As the Court has long recognized, racial bias affecting the impartiality of a jury is especially harmful to the integrity of the justice system. As a consequence, the Court has crafted mechanisms to extirpate racial considerations from almost every stage of the criminal process. The exception is jury deliberations, where, in many jurisdictions, no-impeachment rules preclude even considering whether racial bias affected the impartiality of jury deliberations.

Yet courts regularly inquire into jury deliberations for other reasons. Indeed, the Court has permitted post-trial inquiry and reversed jury verdicts to ensure that the jury was not influenced by evils far less pernicious than racial bias. Given the Sixth Amendment's command of impartiality, this fact highlights the incongruity of courts rooting out racial bias from every stage of the criminal process, yet doing nothing when racial bias may have infected the jury deliberations—arguably the most crucial stage.

A. The Right to an Impartial Jury, Free of Racial Bias, Is Fundamental to the Fair Administration of Criminal Justice

The Sixth Amendment right to trial by jury is "the most priceless" of safeguards for the preservation of individual liberty and dignity in the American criminal-justice system. *Irvin v. Dowd*, 366 U.S. 717, 721 (1961). In 1765, the First Congress of the American Colonies described trial by jury as an "inherent and invaluable right," *Duncan v. Louisiana*, 391 U.S. 145, 152 (1968); in 1774, the First Continental Congress called it a "great and inestimable privilege," *id.*; and in 1776, the Declaration of Independence bemoaned that King George III had "depriv[ed] us in many cases, of the benefits of Trial by Jury," THE DECLARATION OF INDEPENDENCE para. 20 (U.S. 1776).

The right guaranteed by the Sixth Amendment is the right to "a fair trial by a panel of impartial, 'indifferent' jurors." *Irvin*, 366 U.S. at 722. The failure to accord this right to a defendant "violates even the minimal standards of due process." *Id.* As Chief Justice Marshall recognized in 1807, "'those strong and deep impressions which close the mind against the testimony that may be offered in opposition to them, which will combat that testimony and resist its force, do constitute a sufficient objection'" to a juror. *Reynolds v. United States*, 98 U.S. 145, 155 (1878) (quoting 1 Burr's Trial, 416 (1807)).

Biased jurors undermine a central purpose of the jury system: "to impress upon the criminal defendant and the community as a whole that a verdict of conviction or acquittal is given in accordance with the law by persons who are fair." *Powers v. Ohio*, 499 U.S. 400, 413 (1991) (all criminal defendants may object to race-based peremptory challenges, regardless of the race of the defendant or excluded juror).

B. Because Racial Bias Uniquely Harms the Integrity of Jury Verdicts, It Must Be Eradicated at Every Stage of Criminal Trials

Racial bias impairs both the integrity and reliability of the jury system, in violation of the Sixth

Amendment. Accordingly, the Court has implemented mechanisms designed to expunge racial bias from virtually every aspect of the criminal-justice system.

For example, racially discriminatory selection of grand jurors violates the Constitution. *See Castaneda v. Partida*, 430 U.S. 482, 501 (1977); *Reece v. Georgia*, 350 U.S. 85, 87 (1955); *Smith v. Texas*, 311 U.S. 128, 130 (1940); *Neal v. Delaware*, 103 U.S. 370, 394 (1880). Selection of a grand-jury foreperson based on race is unconstitutional. *Rose v. Mitchell*, 443 U.S. 545, 564-65 (1979). Similarly, during *voir dire*, a trial court may properly inquire into possible racial bias of prospective jurors before seating them. *See Turner v. Murray*, 476 U.S. 28, 33 (1986); *Ham v. South Carolina*, 409 U.S. 524, 529 (1973).

In selecting a petit jury, the Constitution prohibits the racially discriminatory use of peremptory challenges by prosecutors. *Powers v. Ohio*, 499 U.S. 400, 416 (1991); *Batson v. Kentucky*, 476 U.S. 79, 96 (1986). The same rule applies to peremptory challenges in civil trials, *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 631 (1991), and to peremptory challenges exercised by criminal defendants, *Georgia v. McCollum*, 505 U.S. 42, 59 (1992).

In recent years, the Court has repeatedly reaffirmed the importance of eliminating racial bias from the criminal-justice system, especially through the *Batson* framework. *See, e.g., Snyder v. Louisiana*, 552 U.S. 472, 482-83 (2008) (prosecutor's proffered

reasons for striking an African-American juror were implausible); *accord Miller-El v. Dretke*, 545 U.S. 231, 266 (2005). Just last term, the Court reversed a decades-old conviction on a finding that "prosecutors were motivated in substantial part by race when they struck [two jurors] from the jury 30 years ago. Two peremptory strikes on the basis of race are two more than the Constitution allows." *Foster v. Chatman*, 136 S. Ct. 1737, 1755 (2016).

In light of the Court's consistent reprobation of bias in the criminal process, some lower courts have implemented additional prophylactic rules to excise racial and ethnic bias. For example, the Eleventh Circuit has held that jury misconduct in the form of racial and anti-Semitic slurs, brought to the attention of the court before the jury renders a verdict, may warrant the declaration of a mistrial. *United States v. Heller*, 785 F.2d 1524, 1528-29 (11th Cir. 1986); *see United States v. McClinton*, 135 F.3d 1178, 1187 (7th Cir. 1998).

Using rules such as these, courts strive to eliminate racial and other forms of discrimination from the arrest, indictment and juror-selection stages of criminal trials—and even, in some cases, from jury deliberations before the jury renders a verdict. Anomalously, however, no-impeachment rules preclude post-verdict inquiry into racial bias during jury deliberations, which are arguably the most important stage of trial by jury An exception to no-

impeachment rules is necessary to ensure the uniform eradication of racial bias from the entire criminal-justice process.

"Discrimination on the basis of race, odious in all aspects, is especially pernicious in the administration of justice." *Rose*, 443 U.S. at 555. In fact, "[n]o surer way could be devised to bring the processes of justice into disrepute" than to "permit it to be thought that persons entertaining a disqualifying prejudice were allowed to serve as jurors." *Aldridge v. United States*, 283 U.S. 308, 315 (1931).

Racial discrimination undermines the institution of the jury by undercutting the democratic ideals that the jury represents:

> "[S]uch discrimination 'not only violates our Constitution and the laws enacted under it but is at war with our basic concepts of a democratic society and a representative government.' The harm is not only to the accused . . . . It is to society as a whole. 'The injury is not limited to the defendant—there is injury to the jury system, to the law as an institution, to the community at large, and to the democratic ideal reflected in the processes of our courts.'"

Rose, 443 U.S. at 556 (citations omitted).

Racial discrimination also impairs the accuracy of jury verdicts. "It is by now clear that conscious

and unconscious racism can affect the way white jurors perceive minority defendants and the facts presented at their trials, perhaps determining the verdict of guilt or innocence." *McCollum*, 505 U.S. at 68 (O'Connor, J., dissenting).

The "pernicious" effect of racial bias among jurors, *Rose*, 443 U.S. at 555, in conjunction with the Sixth Amendment, requires that courts root out such bias no matter when or where they discover it, whether at the stage of jury selection—*see, e.g.*, *Turner*, 476 U.S. at 33; *Rose*, 443 U.S. at 555-56; *Aldridge*, 283 U.S. at 314-15—or at the stage of jury deliberations. An exception to no-impeachment rules will ensure that racial and ethnic bias is extirpated from the entire criminal-justice process, from arrest through jury decision-making.

II. AN EXCEPTION TO NO-IMPEACHMENT RULES FOR RACIAL BIAS WILL NOT IMPAIR THE ADMINISTRATION OF CRIMINAL JUSTICE

The majority of federal appellate courts and state courts of last resort that have considered the interplay between no-impeachment rules and the right to an impartial jury have held that courts may inquire into alleged racial bias in jury deliberations. The experience of these jurisdictions, especially when considered in light of the inquiries into jury delibera-

tions that regularly occur already, shows that inquiry as to racial bias is entirely feasible.

A. Federal and State Courts Already Routinely Inquire into Jury Deliberations, Including for Juror Misconduct

The Colorado Supreme Court expressed concern that "authorizing post-verdict investigations of jurors" would "'seriously disrupt the finality of the process,'" and that "the very potential for such investigations would shatter public confidence in the fundamental notion of trial by jury." Pet. App. 13a (quoting *Tanner v. United States*, 483 U.S. 107, 120 (1987)). Such fears are unfounded.

Federal and state courts already inquire into the possibility of juror misconduct in order to ensure compliance with the Sixth Amendment. As a consequence, a Sixth Amendment exception to no-impeachment rules that is targeted at racial bias would not open up broad new avenues for inquiry. Rather, all that is necessary is a limited extension of existing grounds for inquiries—albeit an extension critical to ensuring the fundamental fairness of all jury trials.

Rule 33(a) of the Federal Rules of Criminal Procedure broadly provides: "Upon the defendant's motion, the court may vacate any judgment and

grant a new trial if the interest of justice so requires." FED. R. CRIM. P 33(a). State rules are similarly flexible. *See, e.g.*, COLO. R. CRIM. P. 33(a) (Colorado equivalent of federal rule).

As to juror misconduct, "[t]his Court has long held that the remedy for allegations of juror partiality is a hearing in which the defendant has the opportunity to prove actual bias." *Smith v. Phillips*, 455 U.S. 209, 215 (1982). This is a fundamental Constitutional right: "Due process means a jury capable and willing to decide the case solely on the evidence before it, and a trial judge ever watchful to prevent prejudicial occurrences and to determine the effect of such occurrences when they happen." *Id.* at 217. Thus, in all jurisdictions, upon a proper initial showing by the defendant, courts must hold proceedings to determine if the jury "decide[d] the case solely on the evidence before it," to ensure that there were no "prejudicial occurrences," and to "determine the effect of such occurrences when they happen." *Id.*

Courts maintain the flexibility and discretion to fashion these inquiries according to the needs of the situation: "[I]n light of the infinite variety of situations in which juror misconduct might be discerned and the need to protect jurors and the jury process from undue imposition, the trial judge is vested with the discretion to fashion an appropriate and responsible procedure to determine whether misconduct actually occurred and whether it was

prejudicial." *United States v. Ortiz-Arrigoitia*, 996 F.2d 436, 443 (1st Cir. 1993). Similarly, in Connecticut, for example, "a trial court must conduct a preliminary inquiry, on the record, whenever it is presented with any allegations of jury misconduct in a criminal case." *State v. Brown*, 668 A.2d 1288, 1303 (Conn. 1995).

Federal and state no-impeachment rules are an evidentiary limitation on this broad, Constitutionally-mandated requirement of inquiry into juror misconduct. Rule 606(b) of the Federal Rules of Evidence and its state equivalents prohibit jurors from testifying on certain topics, such as "any statement made or incident that occurred during the jury's deliberations." As demonstrated in Point II.B below, however, this evidentiary limitation is subject to multiple exceptions.

The prevalence of post-verdict inquiries demonstrates that by recognizing a racial-bias exception to Rule 606(b), the Court would not be creating a new kind of hearing or procedure. Rather, a racial-bias exception would modify the scope of the inquiries that are already required in all jurisdictions. The courts are well-equipped to handle such a change in the scope of post-verdict hearings.

Additionally, although the secrecy of jury deliberations promotes "full and frank discussion in the jury room," *Tanner*, 483 U.S. at 120, the sanctity of the jury process always has been subject to practical

limitations. For example, jurors are allowed to speak to the media regarding jury deliberations, including their mental processes, their motivations for voting for conviction or acquittal, and comments made by other jurors. While courts may discourage such disclosures, they cannot prevent jurors from making them. *See* LEONARD B. SAND ET AL., MODERN FEDERAL JURY INSTRUCTIONS ¶ 9.09 (2015) ("As a matter of law you will have the right after you are dismissed from this courtroom to talk, if you want to talk, I have no power to order you otherwise. . . We do see in the newspapers and on television sometimes a case is decided and the minute they reach the courthouse steps jurors are being interviewed by various people, and they are making statements and saying who said what to whom in the jury room. And how many jurors thought this and how many jurors thought that."); Jane Kirtley, *Keeping Jurors' Lips Sealed*, AM. JOURNALISM REV., Jan.-Feb. 1998, *available at* http://ajrarchive.org/Article.asp?id=1767 ("Although judges often instruct jurors at the conclusion of a trial that they are not obliged to talk to anyone about their service, they do have a constitutional right to speak, which doesn't vanish simply because they have served on a jury.").

More recently, the Internet and social media have provided further outlets for jurors to freely discuss their deliberations. As with traditional media interviews, jurors are not prohibited from revealing

what occurred in the jury room through posts on social media. *See* N.Y. STATE BAR ASS'N, SOCIAL MEDIA JURY INSTRUCTIONS REPORT (2015), https://www.nysba.org/Sections/Commercial_Federal_Litigation/Com_Fed_PDFs/Social_Media_Jury_Instructions_Report.html (anticipating the use of social media after trial); Marcy Zora, *The Real Social Network: How Jurors' Use of Social Media and Smart Phones Affects A Defendant's Sixth Amendment Rights*, 2012 U. ILL. L. REV. 577, 588 (2012) (a juror posted on Twitter after a verdict, "I just gave away TWELVE MILLION DOLLARS of somebody else's money").

Thus, practically speaking, modifying the scope of no-impeachment rules to enable jurors to testify regarding racial bias during jury deliberations would neither "disrupt the finality" of jury verdicts nor "shatter public confidence" in the process, given the limited nature of such a modification and the imperfect secrecy of the jury room.

B. Rule 606(b) Has Exceptions for Less Odious Juror Influences than Express Racial Bias

Although, as discussed in Point I above, racial bias has a particularly destructive effect on the fairness and reliability of the jury system, Rule 606(b)'s evidentiary limitation has exceptions for juror influ-

ences that do not have the same "pernicious" effect on jury impartiality. *See Rose*, 443 U.S. at 555.

Under Rule 606(b) and similar common-law principles, notwithstanding the general prohibition on post-verdict testimony concerning jury deliberations and mental processes, a juror may testify about whether "extraneous prejudicial information was improperly brought to the jury's attention," or about whether "an outside influence was improperly brought to bear on any juror." FED. R. EVID. 606(b)(2); *see Tanner*, 483 U.S. at 117 (providing examples of evidence, in categories described below, which may be admitted notwithstanding Rule 606(b)'s broadly prohibitory language).

Courts have reversed convictions based on prejudicial inferences that arose from information other than the evidence presented at trial. For example, notwithstanding Rule 606(b), juror testimony is permitted concerning whether deliberations were affected by personal knowledge concerning a defendant, which may require reversal of a conviction or a hearing into whether reversal is required. *See, e.g.*, *United States v. Howard*, 506 F.2d 865, 866 (5th Cir. 1975) ("during the jury's deliberations one juror 'stated that the defendant had been in trouble two or three times'"; "this fact was used to pressure the affiant and another juror into aligning with the rest of the panel"); *United States ex rel. Owen v. McMann*, 435 F.2d 813, 815 (2d Cir. 1970) (ju-

rors "informed the other jurors that they 'knew all about' [the defendant] and referred to unfavorable incidents in [the defendant's] life which were entirely unrelated to the charge").

Although less "pernicious" than racial bias, *Rose*, 443 U.S. at 555, the concern in these cases is similar to the concern in this case. In the personal-knowledge cases, a juror attributed criminal acts to the defendant based on purported facts not admissible at trial. The same is true here. *See* Pet. App. 4a (juror stated that "in his experience as an ex-law enforcement officer, Mexican men had a bravado that caused them to believe they could do whatever they wanted with women"). The only difference is that the bias in *Howard* and *Owen* was the result of a juror's outside personal knowledge concerning the defendant, whereas the bias in this case was the result of racial prejudice. Even if this distinction were material, it cuts in favor of permitting inquiry into racial bias, both because personal knowledge at least may be accurate and because racial prejudice more greatly affects societal perceptions of fairness in the criminal-justice system.

Additionally, courts admit evidence of (and reverse jury verdicts because of) unauthorized communication by or to jurors. Courts inquire into such situations even where the juror himself or herself has not made any statements or taken any overt action; the possible prejudicial effect of such statements on a

juror is enough to require an inquiry. *See, e.g.*, *Parker v. Gladden*, 385 U.S. 363, 363-64 (1966) (a court bailiff commented to a juror, "Oh that wicked fellow [the defendant], he is guilty," and said that if the jury erred "the Supreme Court will correct it"); *Mattox v. United States*, 146 U.S. 140, 142 (1892) (a court bailiff said to jurors, "This is the third fellow [the defendant] has killed").

Along the same lines, evidence of attempts to bribe jurors is admissible and may require reversal, even where attempts were clearly unsuccessful (*i.e.*, conviction occurred), because of possible prejudice arising from the bribe attempt itself. Thus, in *Remmer v. United States*, the Court directed a hearing into allegations of juror bribery, even though an FBI investigation had concluded that there was no wrongdoing and the attempt had been made "in jest." 347 U.S. 227, 228-29 (1954) (explaining that the FBI investigation itself could have prejudiced the jury); *see Stimack v. Texas*, 548 F.2d 588, 588 (5th Cir. 1977) (jurors testified that they viewed defendants "more severely" after they received phone calls threatening retribution by the Mafia if the jury did not acquit).

Furthermore, courts reverse convictions in situations involving communications that appear less harmful than threats or bribery. In the case of government actors, "even seemingly innocuous juror conversations and contact between such individuals

and a juror can trigger a presumption of prejudice." *United States v. Rutherford*, 371 F.3d 634, 643 (9th Cir. 2004); *see Turner v. Louisiana*, 379 U.S. 466, 468-70 (1965) (deputy sheriffs who testified for prosecution also drove jurors and spent social time with them); *United States v. Caldwell*, 83 F.3d 954, 956 (8th Cir. 1996) (where jurors witnessed another juror's husband enter the jury room during breaks, "third-party communications regarding the substance of the trial are presumptively prejudicial and can constitute grounds for a new trial unless the government establishes that the contact was harmless to the defendant"); *Little v. United States*, 73 F.2d 861, 867 (10th Cir. 1934) (stenographer who reread jury instructions in the jury room may have influenced deliberations through misinterpretation or use of emphasis).

If courts may permissibly inquire into whether a stenographer's inadvertent use of emphasis could bias a jury's deliberations so severely as to warrant overturning a conviction, there can be no doubt that they must inquire into the far more troubling circumstances of racial bias. These examples show that courts are fully capable of investigating potential juror bias following a verdict without disrupting the system of jury deliberations.

Courts also have admitted evidence of (and reversed convictions due to) jurors' entirely accidental access to outside information, including in circum-

stances that suggest no inherent bias on the jurors' part. *See, e.g., Gov't of Virgin Islands v. Joseph*, 685 F.2d 857, 862-65 (3d Cir. 1982) (two documents not in evidence were inadvertently sent to the jury); *United States v. Vasquez*, 597 F.2d 192, 193 (9th Cir. 1979) (jurors examined case file accidentally left in jury room); *Farese v. United States*, 428 F.2d 178, 179-81 (5th Cir. 1970) (jurors found $750 in cash, about which the court and parties were unaware, in an attaché case during jury's examination of evidence). Again, given the unique evil of racial bias, it is anomalous to allow post-conviction inquiries into innocent mistakes, but to preclude probing into racial bias.

It makes no sense to prohibit the introduction of evidence showing overt racial bias by jurors. Racial prejudice is uniquely "pernicious" to the justice system, *Rose*, 443 U.S. at 555, and demonstrates an obvious and overt lack of the Constitutionally guaranteed impartiality. In the situations discussed above, courts have proven their facility at entertaining evidence concerning jury deliberations without disrupting the criminal-justice system, and even the mere possibility of bias arising from an external influence on the jury is enough to reverse a conviction.

C. In Jurisdictions that Consider Racial Bias, Such Inquiries Are Infrequent, But Often Lead to Reversal

The experience of the 20 jurisdictions that expressly allow consideration of jury-room racial bias confirms that such inquiries are both practical and crucial to protecting Sixth Amendment rights. In those jurisdictions, allegations of racial bias among jurors are relatively rare, confirming the rule's practicality. When allegations of such bias do arise, however, courts have reversed for a new trial or called for further inquiry in over half of the cases, confirming the rule's importance. Together, this experience demonstrates that consideration of racial bias does not unduly consume judicial resources or impair the administration of trials, but that the rule serves an important function in rooting out racial bias.

To reach these conclusions, Amicus analyzed the case law in jurisdictions that approve of courts' consideration of racial bias in jury deliberations as exceptions to no-impeachment rules. Amicus (*i*) identified in each such jurisdiction the leading case or cases that established the principle that courts may inquire into racial bias in deliberations; (*ii*) analyzed the cases that were indicated on Westlaw as "citing" the leading case, and (*iii*) identified whether such judicial review resulted in affirmance or rever-

sal of the challenged verdict due to alleged racial bias.[5]

For purposes of this survey, Amicus did not include jurisdictions where courts have expressed support for a racial-bias exception but have not explicitly adopted such a rule. *See, e.g.*, *United States v. Hayat*, 710 F.3d 875, 886 (9th Cir. 2013) (citing *United States v. Henley*, 238 F.3d 1111, 1121 (9th Cir. 2001)). Notably, even after expressing support for such an exception in dicta, the courts in these jurisdictions have not needed to resolve the question in the several years since the issue has arisen, thus confirming that such challenges are sufficiently rare as to be administratively feasible.

The following chart summarizes the results:

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[5] An explanation of the methodology used by Amicus and its case-by-case results are shown in Appendix A. This analysis may have missed some cases that are unreported or unavailable on Westlaw or otherwise were not identified by Amicus's methodology. Thus, the chart is suggestive rather than definitive. Nonetheless, the research provides a general basis for understanding the frequency with which racial or ethnic bias in deliberations arises and leads to reversal.

	Date of First Case Allowing Racial Bias Challenge	Number of Cases Addressing Inquiry into Racial/Ethnic Bias in Jury Deliberations	Number of Cases Granting New Trial or Hearing	Number of Cases Denying a New Trial or Hearing
First Circuit[6]	2009	2	2	0
Seventh Circuit[6]	1987	1	0	1
Connecticut	1998	5	3	2
Delaware	1996	1	1	0
District of Columbia	2013	1	0	1
Florida	1995	5	5	0
Georgia	1990	1	0	1
Hawaii	1996	1	0	1
Massachusetts	1991	2	1	1
Minnesota	1980	5	3	2
Missouri	2010	1 (ethnic or religious bias)	1 (ethnic or religious bias)	0
New Jersey	1961	1 (religious bias)	1 (religious bias)	0
New York	1986	4	3	1

[6] Including federal district courts within the Circuit.

	Date of First Case Allowing Racial Bias Challenge	Number of Cases Addressing Inquiry into Racial/Ethnic Bias in Jury Deliberations	Number of Cases Granting New Trial or Hearing	Number of Cases Denying a New Trial or Hearing
North Dakota	2008	1	0	1
Oklahoma	2012	1	1	0
Oregon	1981	N/A[7]	N/A	N/A
Rhode Island	2013	1	0	1
South Carolina	1995	2	1	1
Washington	1967	3	1	2
Wisconsin	1982	4 (including religious bias)	1 (religious bias)	3 (including religious bias)
Total		**42**	**24**	**18**

The rarity of allegations of bias confirms the practicality of Petitioner's proposed rule. Amicus's review of these 20 jurisdictions over several decades showed 42 instances in which courts addressed inquiries into allegations of racial bias (including, in some jurisdictions, ethnic or religious bias) during jury deliberations. This shows that the availability

[7] Although an Oregon statute establishes a racial-bias exception, no cases were identified which applied it.

of a remedy for bias during deliberations has not opened the floodgates or overwhelmed the courts. There is no reason to believe that the experience of these 20 jurisdictions would not be reflected nationwide.

At the same time, the frequency with which a new trial or hearing was ordered demonstrates the importance of recognizing a Sixth Amendment exception to no-impeachment rules. In over half of the cases in which courts considered allegations of racial bias in jury deliberations—24 of 42 cases reviewed by Amicus—courts have required new trials or inquiries into the allegations.

With a low systemic cost to the courts as a whole and a high individual value in the specific cases in which it arises, consideration of racial bias in jury deliberations is a paradigmatic example of a beneficial rule. In the jurisdictions that already permit it, the inquiry not only serves to root out racial bias in individual cases, but it carries enormous symbolic importance as a normative statement that the courts will not countenance the type of horrific racial bias that may be revealed. *See, e.g., Kittle v. United States*, 65 A.3d 1144, 1147-48, 1155 (D.C. 2013) (where certain jurors reportedly suggested "that all 'blacks' are guilty," the trial judge had discretion to consider juror testimony to ensure "the public's confidence in the fair administration of justice" and because of the "insidiousness of racial or

ethnic bias"). And even if the trial court concludes that reversal is not warranted, the thoughtful and deliberate consideration of potential racial bias strongly validates the judicial process. The small burden on the courts is thus outweighed both in individual cases and systemically.

D. Courts Are Well-Equipped to Make Judgments Concerning Alleged Racial Bias in Jury Deliberations

The experience of the 20 jurisdictions that allow inquiry into racial bias in jury deliberations demonstrates the error of the Colorado Supreme Court's view that it would be unable to "discern a dividing line between different *types* of juror bias" or between racially biased comments of varying "severity." Pet. App. 14a-15a. The Colorado Supreme Court was wrong for at least four reasons.

First, courts frequently draw precisely that dividing line regarding racial bias in multiple contexts other than jury deliberations.

For example, when faced with *Batson* challenges to prosecutors' use of peremptory challenges, courts are required to conduct "a sensitive inquiry into such circumstantial and direct evidence of intent as may be available" in determining whether prosecutors' use of challenges was proper or whether prosecutors acted with "discriminatory purpose." *Batson*,

476 U.S. at 93-94. As part of this inquiry, courts must look carefully at "all relevant circumstances," including prosecutors' questions and statements during *voir dire* and any pattern of strikes against jurors of a particular race. *Id.* at 96-97; *see Foster*, 136 S. Ct. at 1748 ("We have 'made it clear that in considering a *Batson* objection, or in reviewing a ruling claimed to be *Batson* error, all of the circumstances that bear upon the issue of racial animosity must be consulted.'" (quoting *Snyder*, 552 U.S. at 478)). Indeed, determining a prosecutor's true motive may well be a more difficult judgment than discerning unlawful bias in actual spoken comments made by deliberating jurors.

Similarly, during *voir dire*, courts are entitled to ask questions about racial bias, and must decide whether to excuse jurors for cause based on their responses, as well as any other comments they may make about race. Under the circumstances of a particular case, it may even be an abuse of discretion to fail to ask questions regarding such bias. *See, e.g.*, *Rosales-Lopez v. United States*, 451 U.S. 182, 192 (1981) ("federal trial courts must make such an inquiry when requested by a defendant accused of a violent crime and where the defendant and the victim are members of different racial or ethnic groups"); *Ham*, 409 U.S. at 527 ("we think that the Fourteenth Amendment required the judge in this case to interrogate the jurors upon the subject of ra-

cial prejudice"). These decisions recognize that trial courts are well-equipped to determine whether jurors' responses to such questions require their removal for cause. *See Rosales-Lopez*, 451 U.S. at 189 ("Because the obligation to impanel an impartial jury lies in the first instance with the trial judge, and because he must rely largely on his immediate perceptions, federal judges have been accorded ample discretion in determining how best to conduct the *voir dire*.").

In an analogous context, when courts evaluate the motives underlying employment decisions, they often distinguish between evidence of true racial animus and "stray" racial comments. "Whereas direct evidence of animus relates to the actor's state of mind at the time of making an adverse decision, a stray remark is simply a prejudicial comment that does not bear upon the challenged employment decision." MARK A. ROTHSTEIN ET AL., EMPLOYMENT LAW § 2.7 (5th ed. 2014). A "stray remark" may be identified, among other means, through its "remoteness in person from the individual plaintiff and in time from the adverse decision." *Id.*

Assessing whether a municipality's refusal to rezone was racially motivated—a situation that the Court recently described as a "related context" to the analysis of racial discrimination in jury selection, *Foster*, 136 S. Ct. at 1748—requires a similar fact-specific inquiry. "Determining whether invidious

discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." *Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977), *cited by Foster*, 136 S. Ct. at 1748.

The experience of jurisdictions permitting inquiry into racial bias during jury deliberations confirms that courts are capable of identifying the appropriate "dividing line" in that context as well. In *State v. Johnson*, 951 A.2d 1257 (Conn. 2008), for example, the defendant claimed that jurors' comments identifying the race of certain spectators at the trial showed that those jurors were racially biased. The Connecticut Supreme Court engaged in a careful, fact-specific review of the record—noting, for example, that "five of these seven jurors first mentioned the gender or height of the individuals rather than their race"—before concluding that the jurors' descriptions of the spectators fell on the permissible side of the line. *See id.* at 1279-80 (an alternative holding would "demand an overly cynical and unjustified assessment of the jurors"). The Connecticut courts have further ensured the administrability of this exception by limiting judicial inquiry to "objective evidence of racially related statements and behavior" rather than jurors' subjective beliefs. *State v. Phillips*, 927 A.2d 931, 937-38 (Conn. App. Ct. 2007) (the court "need not, and should not, have asked ju-

rors whether anything improper had influenced their verdict").

Second, courts have already shown that they are able to distinguish between allegations that trigger further inquiry and implausible allegations that require no further investigation when administering the existing exceptions to Rule 606(b) for "extraneous prejudicial information" and for "outside influence[s]."

Courts must sometimes decide whether allegations of juror influence or prejudice are credible, typically based on the source and nature of the allegations. *Compare, e.g., United States v. Moses*, 15 F.3d 774, 778 (8th Cir. 1994) (a juror's claim that someone tampered with his food or drink did not warrant a hearing); *United States v. Caldwell*, 776 F.2d 989, 998 (11th Cir. 1985) (an anonymous telephone call was "speculative and unreliable" and created "no burden to investigate"); *King v. United States*, 576 F.2d 432, 438 (2d Cir. 1978) ("weakly authenticated, vague, and speculative" affidavits required no further inquiry), *with United States v. Angulo*, 4 F.3d 843, 847 (9th Cir. 1993) (a hearing was necessary where a juror "informed the judge that she had received a threatening phone call and that she had told the other jurors about it").

In other cases, even assuming the truth of the allegations at hand, courts must decide whether the statements that occurred could plausibly have influ-

enced the jury. *Compare, e.g., United States v. Lakhani*, 480 F.3d 171, 185 (3d Cir. 2007) ("Here, the jury foreman's 'threat' to keep juror number nine from her new home for months is obvious hyperbole."), *with Haugh v. Jones & Laughlin Steel Corp.*, 949 F.2d 914, 917 (7th Cir. 1991) (Posner, J.) (a new trial was required where a marshal told a jury that it would "be locked up till it renders its verdict, however long that may take," because a marshal's "official position makes him likely to be believed").

Similarly, courts implementing racial-bias exceptions to no-impeachment rules carefully examine allegations to determine whether they are credible, could plausibly have affected the jury, and deserve further review.

For example, in *United States v. Villar*, 586 F.3d 76 (1st Cir. 2009), the First Circuit held that, where "defense counsel received an e-mail message from one of the jurors disclosing that during deliberations another juror said, 'I guess we're profiling but they cause all the trouble,'" the district court had the discretion to hear juror testimony "to determine whether ethnically biased statements were made during jury deliberations." *Id.* at 78, 87 In doing so, the court "emphasize[d] that not every stray or isolated off-base statement made during deliberations requires a hearing at which jury testimony is taken." *Id.* at 87; *see Commonwealth v. McCowen*, 939 N.E.2d 735, 765 (Mass. 2010) ("[T]he judge must de-

termine the precise content and context of the statement to determine whether it reflects the juror's actual racial or ethnic bias, or whether it was said in jest or otherwise bore a meaning that would fail to establish racial bias.").

By contrast, in *State v. Brown*, 62 A.3d 1099 (R.I. 2013), the Rhode Island Supreme Court held that allegations that a juror had said that a Native American defendant was "nothing," that a juror had described Native American defendants as "those people," and that a juror's banging water bottles like tom-tom drums did not require further inquiry, because that behavior, even if it had occurred, was "'ambiguous,' 'innocuous,' and 'capable of different interpretations.'" *Id.* at 1110-11.

Third, in jurisdictions where evidence of racial bias in jury deliberations is considered, courts often employ harmless-error review, *i.e.*, determining whether comments made a difference in the outcome of the trial. *See, e.g.*, *Villar*, 586 F.3d at 87 (after first determining that "ethnically biased statements were made during jury deliberations," the trial court should examine "whether there is a substantial probability that any such comments made a difference in the outcome of the trial"); *Shillcutt v. Gagnon*, 827 F.2d 1155 (7th Cir. 1987).

Through harmless-error review, courts are able to draw a "dividing line" between comments that require reversal and those do not, which the Colora-

do Supreme Court claimed was impossible. For example, in *Shillcutt*, where the defendant was accused of soliciting prostitutes, a juror said, "Let's be logical. He's black and he sees a seventeen year old white girl—I know the type." *Id.* at 1156. Applying harmless-error review, the court concluded that there was no "substantial probability that the alleged racial slur made a difference in the outcome of the trial." *Id.* at 1159; *see State v. Hidanovic*, 747 N.W.2d 463, 467, 474 (N.D. 2008) (juror's statements that Bosnians "stole from my business" and "lied to me regarding the theft and their conduct" "would not have affected the verdict of a hypothetical average jury"); *State v. Hunter*, 463 S.E.2d 314, 316 (S.C. 1995) (juror's use of racial slur, in context, did not deny defendant a fair trial); *Spencer v. State*, 398 S.E.2d 179, 185 (Ga. 1990) (juror's affidavit showed "only that two of the twelve jurors possessed some racial prejudice and does not establish that racial prejudice caused those two jurors to vote to convict Spencer and sentence him to die").

The Colorado Supreme Court gave no reason why harmless-error review is infeasible in this context, given its frequent use to evaluate a host of different challenges to a verdict, ranging from mistaken admission of harmful evidence to prosecutorial misconduct to errors in jury instructions. All of these situations may require judgment calls equally or

more difficult than assessing the impact of openly expressed racial bias.

Fourth, courts have adopted familiar doctrines, presumptions, and rules—the very same judicial doctrines already used in numerous legal contexts—to help them decide which types of comments may have impermissibly infected the jury's decision-making with racial or ethnic bias.

In some jurisdictions, there are relatively strict, bright-line rules requiring courts to hold hearings on all allegations of racial bias. For example, in *Powell v. Allstate Insurance Co.*, 652 So. 2d 354 (Fla. 1995), the Florida Supreme Court found that when "appeals to racial bias are made openly among the jurors," those statements "constitute overt acts of misconduct" requiring a hearing. *Id.* at 357. The court explained, "This is one way that we attempt to draw a bright line." *Id.* Indeed, the court's direction that "[i]f the trial court determines that such statements were made, it shall order a new trial" apparently gave no discretion to excuse such statements as non-prejudicial if they were in fact made. *See id.* at 358.

Similarly, in *State v. Santiago*, 715 A.2d 1 (Conn. 1998), the Connecticut Supreme Court instructed that in "all future cases in which a defendant alleges that a juror has made racial epithets," the trial court should conduct "an extensive inquiry of the person reporting the conduct, to include the

context of the remarks, an interview with any persons likely to have been a witness to the alleged conduct, and the juror alleged to have made the remarks." *Id.* at 22.

Other states leave greater discretion to trial judges to dismiss allegations of racial bias without holding a hearing. For example, Wisconsin uses the same three-step procedure for assessing alleged racial bias that it uses for allegations of extraneous prejudicial information or inappropriate outside influences. The Wisconsin Supreme Court has explained, "The first two steps involve evidentiary questions: (1) Is the proffered evidence competent under [Wisconsin law]; and (2) does the evidence show error, that is, substantial grounds sufficient to overturn the verdict. (3) The third question is whether the party seeking to impeach the verdict was prejudiced requiring that the verdict be upset." *State v. Shillcutt*, 350 N.W.2d 686, 689 (Wis. 1984).

Massachusetts has adopted a burden-shifting framework:

> The defendant therefore bears the initial burden of proving, by a preponderance of the evidence, that the jury were exposed to statements that infected the deliberative process with racially or ethnically charged language or stereotypes. If the defendant meets this burden, the burden then shifts to the

> Commonwealth to show beyond a reasonable doubt that the defendant was not prejudiced by the jury's exposure to these statements.

McCowen, 939 N.E.2d at 766 (citations omitted).

Indeed, *McCowen* stands as an example of a court drawing the dividing line between different circumstances and expressions of racial bias that the Colorado Supreme Court thought impossible. There, juror affidavits alleged "that another juror (Juror Y) said that bruises like those found on the victim's body would result 'when a big black guy beats up on a small woman.'" *Id.* at 761. After a hearing, the trial judge concluded that in the jury room, "Juror Y's words provoked an immediate reaction from the black female juror, who asked Juror Y what being black had to do with it and called her a racist"; a verbal "confrontation" then ensued. *Id.* at 762. Based on that evidence, the court upheld the trial court's conclusion that the juror's response to Juror Y "served the beneficial purpose of exposing and 'blunting the effect' of the racial stereotype, and of warning the jury of the risk of racial stereotypes infecting their deliberations." *Id.* at 766.

Moreover, as is common practice, appellate courts have given deference to factual determinations on the basis that the trial judge is best situated to determine what affected jury deliberations. *See Hidanovic*, 747 N.W.2d at 474 (applying abuse-of-

discretion review); *State v. Levitt*, 176 A.2d 465, 468-69 (N.J. 1961) ("We cannot overlook the factor that the judge who presided at the trial and the hearing was in a better position than this court, which sees only the cold record, to appraise the entire situation and determine whether the defendant's basic rights were violated."). This doctrine helps alleviate concern that appellate judges will need to draw lines between factual circumstances based on "cold records."

In sum, courts can effectively evaluate and judge evidence of racial bias in jury deliberations using standard doctrines and procedures. The Colorado Supreme Court's suggestion that such inquiries would be unmanageable fails to pass Constitutional muster.

CONCLUSION

For the foregoing reasons, the judgment of the Colorado Supreme Court should be reversed.

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Respectfully submitted,

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APPENDICES

In preparing this brief, Amicus reviewed case law in the 20 jurisdictions that Amicus identified as allowing impeachment of jury verdicts on grounds of racial or ethnic bias expressed during deliberations. In each of the relevant jurisdictions, Amicus identified the leading case or cases that established the principle that courts may consider racial bias in jury deliberations. For each leading case, Amicus then analyzed the cases that were indicated by Westlaw as "citing" the leading case and that contained keywords relating to racial bias. For each such case, Amicus ascertained whether the criminal defendant or petitioner had alleged that racial bias infected the verdict. Amicus then recorded the outcome of each case—whether racial bias was grounds for reversal for a new trial or for a hearing into whether a new trial was necessary, or whether the conviction was affirmed. The 42 cases shown in the chart below met these criteria.[8]

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[8] As noted above, Amicus did not include jurisdictions where courts have expressed support for a racial-bias exception but have not explicitly adopted such a rule. *See, e.g.*, *United States v. Hayat*, 710 F.3d 875, 886 (9th Cir. 2013) (citing *United States v. Henley*, 238 F.3d 1111, 1121 (9th Cir. 2001)).

Amicus also did not include federal district courts in jurisdictions where courts of appeals have not adopted a circuit-wide exception. *See, e.g.*, *Wright v. United States*, 559 F. Supp. 1139, 1151 (E.D.N.Y. 1983), *aff'd on other grounds*, 732 F.2d 1048 (2d Cir. 1984); *Tobias v. Smith*, 468 F. Supp. 1287, 1290

Appendix A
Jurisdictions with Sixth Amendment Exceptions to No-Impeachment Rules for Racial or Ethnic Bias

	Cases Addressing Inquiry into Racial/Ethnic Bias in Jury Deliberations	**New Trial or Hearing Granted**	**No New Trial or Hearing**
First Circuit	*United States v. Villar*, 586 F.3d 76 (1st Cir. 2009)	X	
First Circuit	*United States v. Fuentes*, No. 2:12-CR-50-DBH, 2013 WL 4483062 (D. Me. Aug. 19, 2013)	X	
Seventh Circuit	*Shillcutt v. Gagnon*, 827 F.2d 1155 (7th Cir. 1987)		X

(W.D.N.Y. 1979); *Smith v. Brewer*, 444 F Supp. 482, 490 (S.D. Iowa), *aff'd on other grounds*, 577 F.2d 466 (8th Cir. 1978).

Finally, Amicus did not include cases that were decided before the adoption of no-impeachment rules in their respective jurisdictions. *See, e.g., Evans v. Galbraith-Foxworth Lumber Co.*, 31 S.W.2d 496, 500 (Tex. Civ. App. 1929).

Although the foregoing categories of cases are not included in the analysis, they provide additional practical support for recognizing a racial bias exception to no-impeachment rules.

	Cases Addressing Inquiry into Racial/Ethnic Bias in Jury Deliberations	New Trial or Hearing Granted	No New Trial or Hearing
Delaware	*Fisher v. State*, 690 A.2d 917 (Del. 1996)	X	
District of Columbia	*Kittle v. United States*, 65 A.3d 1144 (D.C. 2013)		X
Georgia	*Spencer v. State*, 398 S.E.2d 179 (Ga. 1990)		X
Massachusetts	*Commonwealth v. McCowen*, 939 N.E.2d 735 (Mass. 2010)		X
Massachusetts	*Commonwealth v. Laguer*, 571 N.E.2d 371 (Mass. 1991)	X	
Missouri	*Fleshner v. Pepose Vision Inst., P.C.*, 304 S.W.3d 81 (Mo. 2010) (ethnic or religious bias)[9]	X	
New Jersey	*State v. Levitt*, 176 A.2d 465 (N.J. 1961) (religious bias)	X	
North Dakota	*State v. Hidanovic*, 747 N.W.2d 463 (N.D. 2008)		X

[9] Six states (Missouri, Wisconsin, Connecticut, Florida, Oklahoma and Washington) have applied a bias exception to no-impeachment rules in certain civil cases. The civil cases further demonstrate feasibility and usefulness, as they show that expanding the racial-bias exception to include civil cases does not impair the administration of justice.

	Cases Addressing Inquiry into Racial/Ethnic Bias in Jury Deliberations	New Trial or Hearing Granted	No New Trial or Hearing
Rhode Island	*State v. Brown*, 62 A.3d 1099 (R.I. 2013)		X
South Carolina	*State v. Hunter*, 463 S.E.2d 314 (S.C. 1995)		X
South Carolina	*Bennett v. Stirling*, No. CV 2:13-3191-RMG, 2016 WL 1070812 (D.S.C. Mar. 16, 2016)	X	
Wisconsin	*State v. Shillcutt*, 350 N.W.2d 686 (Wis. 1984)		X
Wisconsin	*After Hour Welding, Inc. v. Laneil Mgmt. Co.*, 324 N.W.2d 686 (Wis. 1982) (religious bias)	X	
Wisconsin	*Anderson v. Burnett Cty.*, 558 N.W.2d 636 (Wis. Ct. App. 1996) (religious bias)		X
Wisconsin	*Jacobs v. Buchanan*, 364 N.W.2d 181 (Wis. Ct. App. 1985)		X

Appendix B
Jurisdictions with Exceptions to No-Impeachment Rules for Racial or Ethnic Bias Based on State Statute or Common Law

	Case Addressing Inquiry into Racial/Ethnic Bias in Jury Deliberations	New Trial or Hearing Granted	No New Trial or Hearing
Connecticut	*State v. Johnson*, 951 A.2d 1257 (Conn. 2008)		X
Connecticut	*State v. Anderson*, 773 A.2d 287 (Conn. 2001)		X
Connecticut	*State v. Santiago*, 715 A.2d 1 (Conn. 1998)	X	
Connecticut	*State v. Phillips*, 927 A.2d 931 (Conn. App. Ct. 2007)	X	
Connecticut	*Horan v. Murgio*, No. 538130, 1998 WL 695282 (Conn. Super. Ct. Sept. 23, 1998)	X	
Florida	*Marshall v. State*, 854 So. 2d 1235 (Fla. 2003)	X	
Florida	*Powell v. Allstate Ins. Co.*, 652 So. 2d 354 (Fla. 1995)	X	

	Case Addressing Inquiry into Racial/Ethnic Bias in Jury Deliberations	New Trial or Hearing Granted	No New Trial or Hearing
Florida	*Wright v. CTL Distribution, Inc.*, 679 So. 2d 1233 (Fla. Dist. Ct. App. 1996)	X	
Florida	*Singletary ex rel. Barnett Banks Trust Co. v. Lewis*, 584 So. 2d 634 (Fla. Dist. Ct. App. 1991)	X	
Florida	*Sanchez v. Int'l Park Condo. Ass'n, Inc.*, 563 So. 2d 197 (Fla. Dist. Ct. App. 1990)	X	
Hawaii	*State v. Jackson*, 912 P.2d 71 (Haw. 1996)		X
Minnesota	*State v. Bowles*, 530 N.W.2d 521 (Minn. 1995)	X	
Minnesota	*State v. Callender*, 297 N.W.2d 744 (Minn. 1980)		X
Minnesota	*State v. Vu*, No. A04-235, 2005 WL 623236 (Minn. Ct. App. Mar. 15, 2005)	X	
Minnesota	*State v. Hinton*, No. C1-98-379, 1998 WL 887495 (Minn. Ct. App. Dec. 22, 1998)		X

	Case Addressing Inquiry into Racial/Ethnic Bias in Jury Deliberations	New Trial or Hearing Granted	No New Trial or Hearing
Minnesota	*State v. Watkins*, 526 N.W.2d 638 (Minn. Ct. App. 1995)	X	
New York	*People v. Estella*, 889 N.Y.S.2d 759 (N.Y. App. Div. 2009)	X	
New York	*Shung Lam v. Cheng*, 773 N.Y.S.2d 303 (N.Y. App. Div. 2004)		X
New York	*People v. Rukaj*, 506 N.Y.S.2d 677 (N.Y. App. Div. 1986)	X	
New York	*People v. Whitmore*, 257 N.Y.S.2d 787 (N.Y. Sup. Ct. 1965)	X	
Oklahoma	*Fields v. Saunders*, 278 P.3d 577 (Okla. 2012)	X	
Oregon	OR. REV. STAT. ANN. § 40.335 (West 1981) (Conference Committee Commentary)	N/A[10]	N/A
Washington	*Seattle v. Jackson*, 425 P.2d 385 (Wash. 1967)		X

[10] According to the legislative history of Oregon's analogue to Rule 606(b), the legislature understood the rule to allow a juror to testify about a fellow juror who "manifested extreme racial prejudice towards one of the parties." However, Amicus found no cases that applied the statute in that manner.

	Case Addressing Inquiry into Racial/Ethnic Bias in Jury Deliberations	New Trial or Hearing Granted	No New Trial or Hearing
Washington	*Turner v. Stime*, 222 P.3d 1243 (Wash. Ct. App. 2009)	X	
Washington	*State v. Hall*, 697 P.2d 597 (Wash. Ct. App. 1985)		X

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No. 15-606

IN THE

Supreme Court of the United States

MIGUEL ANGEL PEÑA RODRIGUEZ,

Petitioner,

v.

STATE OF COLORADO,

Respondent.

ON WRIT OF CERTIORARI TO THE COLORADO SUPREME COURT

BRIEF OF COLORADO DISTRICT ATTORNEYS' COUNCIL AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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CASES

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Batson v. Kentucky,
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Bryant v. Mattel, Inc.,
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Ham v. South Carolina,
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In re Application of National Broadcasting Co.,
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J.E.B. v. Alabama ex rel. T.B.,
511 U.S. 127 (1994). 3, 7, 24

Cited Authorities

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Kittle v. United States,
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Maes v. Dist. Court In and For City and County of Denver,
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Miller-El v. Dretke,
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Murphy v. Florida,
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Nebraska Press Ass'n v. Stuart,
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Parker v. Gladden,
385 U.S. 363 (1966). 22

Patton v. Yount,
467 U.S. 1025 (1984). 8

People v. Alexander,
797 P.2d 1250 (Colo. 1990). 13

Ristaino v. Ross,
424 U.S. 589 (1976). 9, 14

Cited Authorities

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Rosales-Lopez v. United States,
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Sandidge v. Salen Offshore Drilling Co.,
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Sheppard v. Maxwell,
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SmithKline Beecham Corp. v. Abbott Labs.,
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State v. Gould,
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Tanner v. United States,
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Thiel v. Southern Pacific Co.,
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Turner v. Murray,
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United States v. Anello,
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United States v. Bates,
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United States v. Benally,
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United States v. Brown,
352 F.3d 654 (2d Cir. 2003) 25

United States v. Burr,
25 F. Cas. 49 (C.C.D. Va. 1807). 8

United States v. Carey,
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United States v. Corey,
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United States v. Gonzalez,
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United States v. Hayat,
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United States v. Hayden,
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United States v. Heller,
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United States v. Henley,
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United States v. Juror No. One,
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United States v. Kemp,
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United States v. Lawson,
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United States v. Machi,
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United States v. McClinton,
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United States v. Morrow,
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United States v. Nell,
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United States v. Nelson,
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United States v. Resko,
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United States v. Ruiz,
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United States v. Villar,
586 F.3d 76 (1st Cir. 2009).....10, 14, 21

Warger v. Shauers,
135 S. Ct. 521 (2014)..... .. .. *passim*

STATUTES AND OTHER AUTHORITIES

Colo. R. Evid. 606(b)... 2

Colo. Revised Stat. § 20-1-110 1

Colo. Revised Stat. § 20-1-111 1

Fed. R. Evid. 606(b) 6, 16, 18, 23, 26

Sup. Ct. R. 37.6 1

15 Colo. Prac., Crim. Prac. & Procedure
§ 17.24 (2d ed. 2015)..... .... .13

Anne M. Payne & Christine Cohone, *Jury Selection & Voir Dire in Criminal Cases*,
76 Am. Juris. Trials 127 (2016)..... 14

Barbara Allen Babcock, *Voir Dire: Preserving "Its Wonderful Power,"* 27 Stan. L. Rev. 545 (1975).....12

Cited Authorities

Page

Cynthia Lee, *A New Approach to Voir Dire on Racial Bias*, 5 U.C. Irvine L. Rev. 843 (2015) 8, 9, 13, 15

Dennis J. Devine *et al.*, *Jury Decision Making*, 7 Psychol. Pub. Pol'y & L. 622 (2011).....25, 27

Edward T. Swaine, *Pre-Deliberations Juror Misconduct, Evidential Incompetence, and Juror Responsibility*, 98 Yale L.J. 187 (1988) .18

Harry Kalven, Jr. & Hans Zeisel, The American Jury (1966) 20-21

James J. Gobert *et al.*, Jury Selection: The Law, Art and Science of Selecting a Jury (3d ed. 2015) 11

Jennifer M. Hill, *The Effects of Sexual Orientation in the Courtroom: A Double Standard*, 39:2 J. of Homosexuality 93 (2000). 24-25

Jessica L. West, *12 Racist Men: Post-Verdict Evidence of Juror Bias*, 27 Harv. J. Racial & Ethnic Just. 165 (2011) 12, 15

Judge Barry P. Goode, *Religion, Politics, Race, and Ethnicity: The Range and Limits of Voir Dire*, 92 Ky. L.J. 601 (2004) 7

Cited Authorities

Page

Judge Roslyn O. Silver, *Mind Reading, Clairvoyance, and Jury Questionnaires*, Litigation, Fall 2004 .... .13

Lucy Fowler, *Gender and Jury Deliberations: The Contributions of Social Science*, 12 Wm. & Mary J. Women & L. 1 (2005) 24

Maria Krysan, *Privacy and the Expression of White Racial Attitudes: A Comparison Across Three Contexts*, 62 Pub. Opinion Q. 506 (1998) 12

Neil Vidmar & Valerie P. Hans, American Juries: The Verdict (2007) 12

Peter A. Joy, *Race Matters in Jury Selection*, 109 Nw. U.L. Rev. Online 180 (2015) 15

Reid Hastie *et al.*, Inside the Jury (1983)..... . .24

Samuel R. Sommers & Phoebe C. Ellsworth, *The Jury and Race: How Much Do We Really Know About Race and Juries? A Review of Social Science Theory and Research*, 78 Chi.-Kent L. Rev. 997 (2003) 8

Saul M. Kassin & Lawrence S. Wrightsman, The American Jury on Trial: Psychology Perspectives (1988)..... ...20

Cited Authorities

Page

Steven Lubet, Modern Trial Advocacy: Analysis & Practice (4th ed. 2009). 11, 12, 15

Thomas A. Mauet, Trial Techniques (8th ed. 2010) . .11

Toni M. Massaro, *Peremptories or Peers?—Rethinking Sixth Amendment Doctrine, Images, and Procedures*, 64 N.C. L. Rev. 501 (1986).....10

Tracy L. Treger, *One Jury Indivisible: A Group Dynamics Approach to Voir Dire*, 68 Chi.-Kent L. Rev. 549 (1992).... 7

IDENTITY AND INTEREST OF *AMICUS CURIAE*[1]

The Colorado District Attorneys' Council (CDAC) is a statewide organization representing the elected District Attorneys throughout the state. Statutorily created in 1977 by Colorado Revised Statutes §§ 20-1-110, 20-1-111, CDAC currently represents twenty-one of the twenty-two District Attorneys' offices in Colorado, including the 18th Judicial District from which this case originated.

The CDAC's mission is to promote and encourage effective administration of criminal justice in Colorado. To that end, CDAC provides centralized prosecution-related services to Colorado's District Attorneys, including training of personnel, legislative drafting and liaison, legal research, management assistance, case tracking data and safeguarding, and dissemination of data to other criminal justice agencies.

CDAC—representing state prosecutors from across Colorado—has a strong interest in promoting finality in jury verdicts, shielding those verdicts from impeachment, and protecting jurors from harassment and coercion. Accordingly, CDAC urges the Court to affirm the Colorado Supreme Court's decision. Reversing the decision below would undermine the longstanding no-impeachment rule and improperly invade the sanctity of the jury deliberation room.

---

1. Pursuant to this Court's Rule 37.6, counsel for *amicus curiae* certify that this brief was not authored in whole or in part by counsel for any party and that no person or entity other than *amicus curiae* or its counsel has made a monetary contribution to the preparation or submission of this brief. Both parties have consented to the filing of this brief.

SUMMARY OF ARGUMENT

Colorado Rule of Evidence 606(b), like its federal counterpart, prohibits a juror from testifying "as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon his or any other juror's mind or emotions as influencing him to assent to or dissent from the verdict or indictment or concerning his mental processes in connection therewith." The rule's importance is obvious. Post-verdict scrutiny of deliberations deters "full and frank discussion in the jury room, jurors' willingness to return an unpopular verdict, and the community's trust in the system that relies on laypeople." *Tanner v. United States*, 483 U.S. 107, 120-21 (1987). "Allegations of juror misconduct, incompetency, or inattentiveness, raised for the first time days, weeks, or months after the verdict," moreover, "seriously disrupt the finality of the process." *Id.* at 120.

Sixth Amendment challenges to this rule thus have been rejected since *Tanner* decided the question nearly thirty years ago. As the Court noted in *Tanner*, "investigation into juror misconduct would in some instances lead to the invalidation of verdicts reached after irresponsible or improper juror behavior." *Id.* But it was "not at all clear ... that the jury system could survive such efforts to perfect it." *Id.* The Court recognized, furthermore, that allowing the perfect to be the enemy of the good would be especially unwise here given the multiple procedural protections that ensure against juror bias seeping into deliberations. "The suitability of an individual for the responsibility of jury service," for example, "is examined during voir dire." *Id.* at 127. And "jurors are observable by each other, and may report inappropriate juror behavior *before* they render a

verdict." *Id.* With these protections firmly in place, the Court determined that post-verdict litigation probing of juror deliberations was unwarranted.

Petitioner's plea to overrule *Tanner* with regard to racial bias should be rejected. Although he tries, Petitioner cannot identify a neutral basis for creating this special exception. For example, Petitioner claims that the settled understanding that "voir dire provides a means of discovering actual or implied bias and a firmer basis upon which the parties may exercise their peremptory challenges intelligently," *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 143-44 (1994), does not apply to claims of racial bias. But that assertion is difficult to reconcile with the Court's holding that a defendant's right to an impartial jury may be violated when a trial court prohibits him from probing racial bias during voir dire. *See Aldridge v. United States*, 283 U.S. 308 (1931). The constitutional foundation for this requirement would be far from clear if voir dire, as Petitioner now claims, cannot identify a prospective juror's racial bias.

Petitioner's claim that racial bias is special because prospective jurors are uniquely embarrassed to disclose it lacks factual support. All of the sources upon which he relies explain how jurors are hesitant to admit *any* bias in court. Petitioner's claim that courts are uniquely reluctant to permit questions on racial bias during voir dire also lacks empirical support. Courts in many states, including Colorado, routinely permit such questioning. Indeed, this Court has used its supervisory power to set a low bar for requiring it. *See Rosales-Lopez v. United States*, 451 U.S. 182, 191 n.7 (1981). In short, there is no support for the argument that racial bias is immune from

the primary tool courts have long relied upon to uncover all types of potentially prejudicial attitudes and beliefs on the part of jurors.

The same goes for juror reporting. Jurors spend all day (and sometimes night) together during a trial. Thus, they are positioned to perceive bias in their fellow jurors and to report it to the court. Petitioner's attempts to argue otherwise when it comes to race fall short. According to Petitioner, jurors may not even know that racial bias is impermissible. But even if that were true—which is doubtful in light of the many cases in which jurors have reported racial bias to courts—that also would be true of gender bias, religious bias, or, for that matter, nearly any type of bias. If that problem exists, it can be cured through more specific jury instructions; it is not some special problem that exists only in the context of racial bias.

Petitioner's supposition that a juror is uniquely unlikely to report racial bias because doing so requires him to "formally accuse another juror of being racist" and to confront that juror "from the witness stand" suffers from the same flawed logic. There is no reason to believe jurors are more apprehensive to level a charge of racial bias than a charge of gender or religious bias—or any other type of juror bias or misconduct. Moreover, Petitioner distorts how trial judges respond to reports of misconduct from the jury room. In most instances, the court will question the jurors individually; there is no trial-like confrontation with the accused juror to fear. Here too, then, there simply is no distinction between reporting racial bias and all other instances of juror misconduct.

The consequences that would result from adopting Petitioner's proposed rule confirm its imprudence. The Constitution guarantees *all* criminal defendants the right to an impartial jury. Even just one biased juror—no matter the basis—can undermine that vital guarantee. Yet Petitioner asks this Court to rule that racial bias deserves protection afforded to no other category of bias—a distinction not found in the Sixth Amendment. Those criminal defendants who believe that the jury's verdict was infected by gender, nationality, or sexual-orientation bias thus would have fewer rights under the Sixth Amendment than other defendants. That should trouble the Court.

To be sure, the Court has acknowledged the odious nature of racial bias and its effect on criminal defendants. But it is equally true that bias based on gender, sexual orientation, and criminal history, for example, have similar significant effects on criminal trials. Petitioner responds that *Batson* shows that there is no line-drawing problem here as it has only been extended to gender-based peremptory strikes. But *Batson* proves the opposite. Lower courts continue to struggle to confine *Batson* to race and gender given that the rule's underlying reasoning applies equally to striking jurors based on their membership in any group. Indeed, some courts have extended *Batson* to peremptory strikes based on religion, ancestry, nationality, and sexual orientation.

Given the absence of any principled way to limit Petitioner's proposed rule to race, the Court is faced with a stark choice: stand by *Tanner* or overturn it. This should not be a tough choice. As the Court reiterated two years ago, *see Warger v. Shauers*, 135 S. Ct. 521 (2014),

Tanner was rightly decided, has not been undermined, and is still the only feasible way to ensure candor among the jurors. The Colorado Supreme Court's decision should be affirmed.

ARGUMENT

I. Petitioner Cannot Distinguish *Tanner*.

In *Tanner v. United States*, 483 U.S. 107 (1987), the Court upheld Federal Rule of Evidence 606(b) against a Sixth Amendment challenge. The Court unanimously reaffirmed that ruling in *Warger v. Shauers*, 135 S. Ct. 521 (2014). As the Court has twice explained, a "defendant's right to an unimpaired jury [is] sufficiently protected by voir dire" and "the parties' ability to bring to the court's attention any evidence of bias before the verdict is rendered," *id.* at 529, including evidence from jurors who "report inappropriate juror behavior to the court," *Tanner*, 483 U.S. at 127. Although Petitioner accepts this general rule, he contends it should not extend to racial bias. But there is no basis for creating the special exception Petitioner proposes. All the objections he raises apply across the board to all forms of juror bias and misconduct. The Court therefore must reject Petitioner's argument or overturn *Tanner*.

A. Voir dire is a powerful tool that can root out all juror bias.

"[V]oir dire plays a critical function in assuring the criminal defendant that his Sixth Amendment right to an impartial jury will be honored." *Rosales-Lopez v. United States*, 451 U.S. 182, 188 (1981). Voir dire starts with

simple questions about jurors' "place of residence, age, marital status, occupation, and level of education." Tracy L. Treger, *One Jury Indivisible. A Group Dynamics Approach to Voir Dire*, 68 Chi.-Kent L. Rev. 549, 556 (1992). But from there, judges and lawyers can probe the jurors' religious and political beliefs, racial views, and even their drinking habits to evaluate jurors' fitness to serve. *See* Judge Barry P. Goode, *Religion, Politics, Race, and Ethnicity: The Range and Limits of Voir Dire*, 92 Ky. L.J. 601, 610-14, 619, 627-28 (2004). This process, though often tedious, is one of the chief means of ensuring compliance with the Sixth Amendment.

Voir dire neutralizes jurors' biases in two primary ways. First, it "provides a means of discovering actual or implied bias and a firmer basis upon which the parties may exercise their peremptory challenges intelligently." *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 143-44 (1994). This protects a "defendant's right to exercise peremptory challenges," *Rosales-Lopez*, 451 U.S. at 188, which is "one of the most important of the rights secured to the accused," *Swain v. Alabama*, 380 U.S. 202, 218-19 (1965), *overruled on other grounds by Batson v. Kentucky*, 476 U.S. 79 (1986). Second, voir dire ensures that judges may "remove prospective jurors who will not be able impartially to follow the court's instructions and evaluate the evidence." *Rosales-Lopez*, 451 U.S. at 188; *see also Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 602 (1976) (Brennan, J., concurring) (explaining that voir dire allows for "searching questions that might root out indications of bias, both to facilitate intelligent exercise of peremptory challenges and to help uncover factors that would dictate disqualification for cause.").

The Court has repeatedly recognized voir dire's key role in uncovering the biases of prospective jurors. Aside from generally declaring "that voir dire can be an essential means of protecting" the right to an impartial jury, *Warger*, 135 S. Ct. at 528-29, the Court has specifically explained that "[v]oir dire has long been recognized as an effective method of rooting out ... bias, especially when conducted in a careful and thoroughgoing manner." *Patton v. Yount*, 467 U.S. 1025, 1038 n.13 (1984) (quoting *In re Application of National Broadcasting Co.*, 653 F.2d 609, 617 (D.C. Cir. 1981)). In short, "[i]t is fair to assume that the method we have relied on since the beginning usually identifies bias." *Id.* (citing *United States v. Burr*, 25 F. Cas. 49, 51 (C.C.D. Va. 1807) (Marshall, C.J.)).

Voir dire also counteracts bias by reminding jurors of their obligation to render impartial verdicts. Empirical research shows that bias is usually implicit. *See* Cynthia Lee, *A New Approach to Voir Dire on Racial Bias*, 5 U.C. Irvine L. Rev. 843, 860 (2015). Jurors can hold racial biases, for example, without knowing it. *Id.* Often, that unconscious bias is "at odds with conscious beliefs." *Id.* In the context of racial bias, voir dire forces prospective jurors to "think about their racial attitudes and ... about social norms against racial prejudice and institutional bias." Samuel R. Sommers & Phoebe C. Ellsworth, *The Jury and Race: How Much Do We Really Know About Race and Juries? A Review of Social Science Theory and Research*, 78 Chi.-Kent L. Rev. 997, 1027 (2003). "[R]ecent empirical research has shown that when race is made salient" through voir dire, among other methods, jurors "are more likely to treat similarly situated Black and White defendants the same way." Lee, *supra*, at 861. This is because one of the best ways "to overcome implicit racial

bias is to recognize its existence." *Id.* at 866. Or, as this Court has explained, "brief, general questions ... appear sufficient to focus the attention of prospective jurors on any racial prejudice they might entertain." *Ham v. South Carolina*, 409 U.S. 524, 527 (1973).

Time and again, this Court has acknowledged that voir dire is an effective tool for exposing racial bias. Starting in *Aldridge v. United States*, 283 U.S. 308 (1931), the Court has held that defendants have a constitutional right in many instances to question jurors about race during voir dire. *Ham*, 409 U.S. at 527 ("[T]he essential fairness required by the Due Process Clause of the Fourteenth Amendment requires that ... the [defendant] be permitted to have the jurors interrogated on the issue of racial bias."); *Turner v. Murray*, 476 U.S. 28, 36 (1986) ("In the present case, we find the risk that racial prejudice may have infected petitioner's capital sentencing unacceptable in light of the ease with which that risk could have been minimized."). Accordingly, the Court has held that a case "may present circumstances in which an impermissible threat to the fair trial guaranteed by due process is posed by a trial court's refusal to question prospective jurors specifically about racial prejudice during Voir dire." *Ristaino v. Ross*, 424 U.S. 589, 595 (1976). That holding necessarily confirms that voir dire effectively neutralizes racial bias. Otherwise, after all, the constitutional right to a "fair trial" would not be jeopardized by a court's refusal to permit such questioning.

There is no reason to stray from these longstanding principles here. All forms of potential juror bias present Sixth Amendment concerns. *See McDonough Power Equip., Inc. v. Greenwood*, 464 U.S. 548, 554 (1984) ("One

touchstone of a fair trial is an impartial trier of fact—'a jury capable and willing to decide the case solely on the evidence before it.'" (citation omitted)); *Murphy v. Florida*, 421 U.S. 794, 800 (1975) (describing an impartial juror as someone who can "lay aside his impression or opinion and render a verdict based on the evidence presented in court."). Thus, courts may disqualify prospective jurors if there is "a blood relationship between a party and the potential juror, a pecuniary interest in the outcome of the case, or prejudice [of any kind] against either party." Toni M. Massaro, *Peremptories or Peers?—Rethinking Sixth Amendment Doctrine, Images, and Procedures*, 64 N.C. L. Rev. 501, 519 n.103 (1986). The Sixth Amendment right to an impartial jury does not expand or contract based on whether the bias is grounded in racial prejudice.

The courts that have held voir dire is inadequate at uncovering racial bias are unpersuasive. *See, e.g.*, *Kittle v. United States*, 65 A.3d 1144, 1155 (D.C. 2013). Unable to rely on empirical evidence, the argument amounts to *ipse dixit*. In *United States v. Villar*, for example, the First Circuit asserted as fact that "[w]hile individual pre-trial voir dire of the jurors can help to disclose prejudice, it has shortcomings because some jurors may be reluctant to admit racial bias." 586 F.3d 76, 87 & n.5 (1st Cir. 2009). But for support the court relied almost exclusively on a concurrence that had nothing to do with racial bias. *See id.* at 87 n.5 (citing *McDonough Power*, 464 U.S. at 558 (Brennan, J., concurring)). According to the concurrence, "the bias of a juror will rarely be admitted by the juror himself ... 'partly because the juror may have an interest in concealing his own bias and partly because the juror may be unaware of it.'" *McDonough Power*, 464 U.S. at 558 (Brennan, J. concurring) (citation omitted). As a result,

bias "necessarily must be inferred from surrounding facts and circumstances." *Id.* But *McDonough Power* was a personal-injury case where a juror failed to disclose that his son had suffered an injury that could affect his impartiality. *See id.* at 549-50. The concurring opinion's statement about jurors' reluctance to admit bias thus referred to *all* forms of bias—not just race.

Petitioner fares no better. Rather than demonstrate that voir dire is uniquely ineffective at identifying racial bias, he mounts an attack against the very practice of voir dire. He first claims that jurors are more embarrassed to admit racial biases publicly than other forms of bias, which makes it more difficult to expose racial bias in voir dire. Pet. Br. 26-27. But the argument lacks factual support. Petitioner references two sources for the asserted proposition, *viz.*, that jurors are "less than candid when asked directly about their beliefs and attitudes, particularly in front of strangers in a group setting." *Id.* (quoting Thomas A. Mauet, Trial Techniques 44 (8th ed. 2010)); *id.* (citing for the same proposition Steven Lubet, Modern Trial Advocacy: Analysis & Practice 485-86 (4th ed. 2009)). Yet neither limits the assertion to racial bias. *See* Mauet, *supra*, at 44; Lubet, *supra*, at 485-86. In fact, the cited pages of both sources fail even to mention racial bias. *Id.* Petitioner's third source, a guide on jury selection, simply advises defense attorneys against asking jurors "directly" whether "they will be prejudiced by a party's race." Pet. Br. 26 (quoting James J. Gobert *et al.*, Jury Selection: The Law, Art and Science of Selecting a Jury § 7:41 (3d ed. 2015)). It instead advises that "the issue should be approached more indirectly" through "[o]pen-ended questions." *Id.* This, too, applies to any bias, as Petitioner's own sources explain. *See, e.g.*, Lubet, *supra*,

at 486 (advising against asking direct questions such as "[a]re you a responsible person?" because "[p]eople almost universally think of themselves as responsible, and those who do not are unlikely to admit it.").

The Professors of Law *amici* advance a similar claim, which they likewise fail to support. Professors of Law Br. 10-13. Most of the Professors' sources just explain that jurors may be unlikely to admit expressly that they hold any bias—not just racial biases. *See, e.g.*, Neil Vidmar & Valerie P. Hans, American Juries: The Verdict 90-91 (2007) (relying on a study that found "[s]ome prospective jurors did not reveal to the court that close friends and family worked in law enforcement. Jurors who had been crime victims did not always admit it in court."); Barbara Allen Babcock, *Voir Dire: Preserving "Its Wonderful Power,"* 27 Stan. L. Rev. 545, 554 (1975) (explaining that "jurors are simply not aware of their prejudices or underestimate the impact of their biases on their ability to weigh the evidence."); Jessica L. West, *12 Racist Men: Post-Verdict Evidence of Juror Bias*, 27 Harv. J. Racial & Ethnic Just. 165, 201 (2011) ("Even if adequate trial mechanisms existed to discern juror biases pre-deliberation, not all jurors with material biases would disclose those biases."). A final source claims that people are unlikely to admit racial bias due to the fact that it is a socially undesirable position to hold. *See* Maria Krysan, *Privacy and the Expression of White Racial Attitudes: A Comparison Across Three Contexts*, 62 Pub. Opinion Q. 506, 507-09 (1998). But that intuitive conclusion applies to any number of biases, such as gender, religious, or sexual-orientation bias, or even prejudice due to pretrial media coverage. *See, e.g.*, *Coppedge v. United States*, 272 F.2d 504, 508 (D.C. Cir. 1959) ("It is too much to expect of

human nature that a juror would volunteer, in open court, before his fellow jurors, that he would be influenced in his verdict by a newspaper story of the trial.").

Regardless, even if jurors were somehow less likely to disclose publicly racial bias than other biases, there are ample tools to combat that problem. A judge can back up his admonition to answer questions truthfully with "the threat of contempt or perjury prosecutions" if jurors answer questions during voir dire untruthfully. *United States v. Benally*, 546 F.3d 1230, 1240 (10th Cir. 2008). For their part, jurors are free to request a sidebar so that they may address the issue in private. In Colorado, for example, an attorney may request *in camera* questioning "when an individual juror expresses embarrassment or requests to be questioned in private concerning a sensitive matter." 15 Colo. Prac., Crim. Prac. & Procedure § 17.24 (2d ed., 2015). The trial judge also may "conduct individual voir dire at the bench when appropriate." *Id.*; *see People v. Alexander*, 797 P.2d 1250, 1258-59 (Colo. 1990) (describing brief sidebar questioning of prospective jurors on a sensitive topic). And, counsel can request anonymous written questionnaires that include a question about racial bias. *See, e.g.*, Judge Roslyn O. Silver, *Mind Reading, Clairvoyance, and Jury Questionnaires*, Litigation, Fall 2004, at 70 ("Indisputably, these jurors fully revealed their racial beliefs and attitudes because they were comfortable that the answers would not be disclosed to the public."). Finally, courts can include information about implicit bias in their juror orientation materials. *See* Lee, *supra*, at 866-67. These avenues ensure that even if voir dire questioning does not reveal racial bias, such bias can be counteracted before the trial begins.

Petitioner responds that even if voir dire could in theory combat racial bias, in practice courts are hesitant to allow questioning on the topic. Pet. Br. 24. As noted above, however, the Constitution has been interpreted to require courts to allow questioning on racial biases in certain circumstances. *See Turner*, 476 U.S. at 36-37. It is enough to require questioning on potential racial bias if the defendant is black and the victim is white in a capital case, *see id.* at 36-37, or when racial issues are "inextricably bound up with the conduct of the trial." *Ristaino*, 424 U.S. at 597. Indeed, the Court has set a low bar for requiring this line of inquiry in federal courts. *Rosales-Lopez*, 451 U.S. at 191 n.7 (1981) ("[I]f the defendant claims a meaningful ethnic difference between himself and the victim, his voir dire request should ordinarily be satisfied."). "Most states" likewise "give trial counsel broad discretion in questioning prospective jurors to expose biases and predispositions affecting jurors' impartiality." Anne M. Payne & Christine Cohone, *Jury Selection & Voir Dire in Criminal Cases*, 76 Am. Juris. Trials 127, § 4 (2016). Colorado, in particular, has recognized "[t]hat voir dire inquiry is permissible into matters of racial prejudice in the interest of obtaining a fair and impartial jury." *Maes v. Dist. Court In and For City and County of Denver*, 503 P.2d 621, 624-25 (Colo. 1972).

But this is still insufficient, according to Petitioner, because even if counsel is allowed to inquire about racial bias, "counsel is well advised not to pose direct questions on the topic" because it "might be viewed as insulting to jurors or as raising an issue defense counsel does not want to highlight." Pet. Br. 25 (quoting *Villar*, 586 F.3d at 87 n.5). As an initial matter, this claim is flawed because

"where the system allows, the zealous advocate [may] face[] an ethical and strategic imperative to raise issues of race during voir dire." Peter A. Joy, *Race Matters in Jury Selection*, 109 Nw. U.L. Rev. Online 180, 183 (2015); *see also Maes*, 503 P.2d at 625 ("It was counsel's duty to make diligent inquiry into the existence of potential prejudice that might exist in the jurors' minds by reason of petitioner's racial heritage."). Counsel's failure to do so can be detrimental to his client's interests as the threat of juror bias is seen as "most significant when bias is neither discussed nor otherwise injected into trial." West, *supra*, at 192; *see also* Lee, *supra*, at 861. But, like Petitioner's other objections, this concern is not confined to racial bias. Posing direct questions on racial bias is no more likely to insult jurors or raise an issue that defense counsel does not want to highlight than posing direct questions about any number of other biases. *See* Lubet, *supra*, at 486.

Ultimately, Petitioner's claim that racial bias is a significant factor in jury selection but that investigation into it can be postponed until after the trial is untenable. Such a regime defeats the purpose of voir dire, which is to "allow the defendant to evaluate the prospective jurors and select a fair and impartial jury," *United States v. Hayden*, 511 F. App'x 870, 872 (11th Cir. 2013), by "discerning bias or prejudice in potential jurors," *Sandidge v. Salen Offshore Drilling Co.*, 764 F.2d 252, 258 (5th Cir. 1985). Petitioner understood he could challenge a prospective juror's racial bias during voir dire. But his counsel declined to do so. Pet. Br. 5-6 (describing voir dire as focusing on whether the prospective jurors could be "fair" or whether they had feelings "for or against" Petitioner). Petitioner should not be permitted to admit evidence of bias that his counsel failed even to attempt to elicit before trial started.

At base, Petitioner's request for a special rule for claims of racial bias is unsupportable. Without any support that racial bias is more difficult to reveal in voir dire than other forms of juror bias, Petitioner's argument must be seen for what it is: an attack on *Tanner*. But instead of revisiting *Tanner* a mere two years after reaffirming it, the Court should again hold that voir dire is a safeguard for ensuring an impartial jury.

B. Juror reporting before a verdict can remedy forms of juror bias not discovered during voir dire.

Tanner also held that Rule 606(b) safeguards a defendant's "Sixth Amendment interests in an unimpaired jury" because jurors "may report inappropriate juror behavior to the court before they render a verdict." 483 U.S. at 127. *Warger* reaffirmed that "juror impartiality is adequately assured by the parties' ability to bring to the court's attention any evidence of bias before the verdict is rendered." 135 S. Ct. at 529. Petitioner is unable to offer a persuasive explanation for why this is true for all forms of juror bias and misconduct except racial bias.

As the Court has explained, "jurors are observable by each other" throughout the trial. *Tanner*, 483 U.S. at 127. They interact in the courtroom, during breaks and recesses, at lunch, outside of the courthouse, and during deliberations. *See, e.g.*, *United States v. Lawson*, 677 F.3d 629, 639 (4th Cir. 2012) (reporting a juror's consultation of an outside source in the jury room); *United States v. Henley*, 238 F.3d 1111, 1113 (9th Cir. 2001) (reporting a statement made while carpooling to and from the trial); *United States v. McClinton*, 135 F.3d 1178, 1184 (7th Cir.

1998) (reporting a statement made during a break in the courtroom); *United States v. Resko*, 3 F.3d 684, 686, 687 (3d Cir. 1993) (reporting juror misconduct while on a recess); *United States v. Juror No. One*, 866 F. Supp. 2d 442, 448 (E.D. Pa. 2011) (reporting how a juror sent inappropriate emails to other jurors). The opportunities for jurors to observe each other, of course, proliferate when they are sequestered. Because they spend so much time together, "[i]t is not unusual for jurors to develop personal relationships with each other." *United States v. Morrow*, 412 F. Supp. 2d 146, 173 (D.D.C. 2006). They become comfortable with each other and open up much more than they would with the judge. *See id.* (explaining how jurors celebrated the end of trial with an after-verdict picnic). As a consequence, jurors are especially likely to reveal potential biases to each other, which uniquely positions them to identify and report potential biases.

Petitioner makes three arguments as to why juror reporting is not an adequate safeguard when it comes to racial bias. All are unpersuasive.

1. First, he claims that "jurors may not realize that racially biased statements made during deliberations are legally impermissible" because they are instructed "to consider the evidence in light of ... their 'observations and experiences in life.'" Pet. Br. 22 (citation omitted). According to Petitioner, this case shows that "where jurors couch racially biased assertions in the language of past experience," they "may assume such statements, though offensive, are legally permissible." *Id.* But this criticism of juror reporting as a safeguard obviously applies to all forms of bias or juror misconduct. For example, a juror might inappropriately credit a police officer's testimony

over the defendant's because, in his experience, police officers are always more trustworthy than criminal defendants. If juror reporting is an adequate safeguard in that instance, it is an adequate safeguard here.

Indeed, this line of argument has nothing to do with racial bias at all. It is a complaint about jury instructions that do not educate the jury about the difference between personal experiences and impermissible biases. If this problem exists, then, courts can solve it by advising or admonishing the jury to refrain from all forms of misconduct, including "harassment of other jurors, alcohol or drug use, exposure to out-of-court facts (by experimentation, research, or inadvertence), or nondisclosure of bias, prejudice, or conflict." Edward T. Swaine, *Pre-Deliberations Juror Misconduct, Evidential Incompetence, and Juror Responsibility*, 98 Yale L.J. 187, 201-02 (1988). The trial court could even instruct the "jury at the beginning of trial on Rule 606(b)," or a state counterpart, which "would inform the conscientious juror of the court's constraints and facilitate notifying court officers of misconduct before deliberations, when they could be informed of the misconduct *and* its effects." *Id.* at 201. There is a good reason why courts "presume[] that jurors, conscious of the gravity of their task, attend closely the particular language of the trial court's instructions in a criminal case and strive to understand, make sense of, and follow the instructions given them." *Francis v. Franklin*, 471 U.S. 307, 324 n.9 (1985). Instructions specifically addressing racial bias would obviate any risk—however unlikely—that jurors will not "realize that racially biased statements made during deliberations are legally impermissible." Pet. Br. 22.

2. Petitioner also argues that "where jurors perceive the impropriety of another's conduct during deliberations, they are unlikely to report it." Pet. Br. 23. Because jurors are encouraged "to behave cooperatively," he claims, they are unlikely to "formally accus[e] another juror of being a racist" because it is "particularly fraught with the possibility of stirring unwanted conflict." *Id.* In short, no juror hopes to "'confront their peers' from the witness stand concerning racially biased remarks." *Id.* (citing *Kittle*, 65 A.3d at 1155).

Like Petitioner's other arguments, however, this one is based on mistaken assumptions. Jurors do not have to "formally accuse" a juror of being racist to report bias to the court. Jurors have many confidential avenues through which they can report racial bias. They can contact the judge directly, via written or electronic communication or by telephone, and indirectly through court staff. *See, e.g.*, *McClinton*, 135 F.3d at 1184 (reporting potential racial bias to the judge directly by letter); *United States v. Machi*, 811 F.2d 991, 1005 (7th Cir. 1987) (phoning the judge at home to report misconduct); *United States v. Carey*, 337 F. App'x 256, 259 (3d Cir. 2009) (reporting to the jury clerk that jurors were prematurely discussing the merits of the case).

Nor do jurors need to take "the witness stand" to confront their peers. After learning of misconduct, courts can question jurors individually out of the presence of the others to investigate whether a particular juror is unfit to serve. *See, e.g., United States v. Heller*, 785 F.2d 1524, 1525-26 (11th Cir. 1986). This is routine; in fact, "there are times in which individual questioning is the optimal way in which to root out misconduct." *United States v. Kemp*,

500 F.3d 257, 302 (3d Cir. 2007) (collecting cases). After the individual questioning is conducted, the parties can evaluate whether they wish to have the juror dismissed for cause, and, if so, the court can then decide whether that is warranted. *See Heller*, 785 F.2d at 1525-26 (individually questioning jurors and discovering that anti-Semitic slurs occurred in the jury room); *United States v. Anello*, 765 F.2d 253, 259 (1st Cir. 1985) (individually questioning jurors, dismissing tainted jurors, and proceeding with trial). The adversarial proceeding Petitioner depicts—with jurors testifying against each other in open court—is just not reality. The only proceeding his portrayal resembles is the post-trial challenge to the verdict—where jurors testify and can expect to be cross-examined by the prosecutor—that he asks the Court to impose here.

Regardless, this argument (like the rest) fails to distinguish racial bias from other juror misconduct. If accusing a fellow juror of racial bias raises the specter of confrontation, so too does accusing someone of bias based on gender, religion, or sexual orientation—or accusing jurors of considering any other improper consideration or engaging in any other type of misconduct. If the instruction "to behave cooperatively" and "reach consensus" pressures jurors into concealing racial bias, then it pressures jurors into concealing other biases and juror misconduct as well.

3. Finally, Petitioner claims that "[o]nce a straw poll has been taken and a majority is leaning towards guilt, dissenters are incentivized to keep quiet and conform." Pet. Br. 24 (citing Saul M. Kassin & Lawrence S. Wrightsman, The American Jury on Trial: Psychology Perspectives 174-75, 180-84 (1988); Harry Kalven, Jr. & Hans Zeisel, The

American Jury 463 & n.9 (1966)). Here, the record refutes the suggestion that dissenting jury members kept quiet and conformed. Deliberations became heated, as the judge reported on the record, and ultimately the dissenters refused to join a guilty verdict on the most serious charge. JA 67-71. Petitioner also incorrectly assumes that juror misconduct occurs only once deliberations have begun and, even then, only once there has been a straw poll. The juror misconduct in *this* case arose during deliberations. But juror misconduct can arise at any juncture in the trial. *See, e.g.*, *Henley*, 238 F.3d at 1113-14 (juror revealed racial bias while carpooling to and from trial); *Heller*, 785 F.2d at 1525-26 (juror reported anti-Semitic slurs shortly after deliberations began); *Bryant v. Mattel, Inc.*, No. 04-CV-09049, 2008 WL 3367605, at *1-3 (C.D. Cal. Aug. 8, 2008) (juror reported comments on the defendant's ethnicity shortly after the start of the second phase of trial). And, once again, this concern applies equally to reporting all types of juror misconduct.

The lower court decisions upon which Petitioner relies do not advance his cause. Those that even address juror reporting, *see, e.g.*, *Villar*, 586 F.3d at 87 (failing to address the jury reporting protection in its analysis), declared (like Petitioner) that it does not adequately check racial bias because race is different. In *Kittle*, for example, the court simply declared that "[t]he insidiousness of racial or ethnic bias is ... distinguishable from other forms of juror misconduct or incompetence." 65 A.3d at 1155. "To hold otherwise," the court announced, would "risk violating 'the plainest principles of justice.'" *Id.* (quoting *Villar*, 586 F.3d at 84). But these broad pronouncements, devoid of any actual support, are not a legitimate basis for seeking an exception from precedent holding that "report[ing]

inappropriate juror behavior to the court before they render a verdict" safeguards a defendant's right to an impartial jury. *Tanner*, 483 U.S. at 127 (emphasis omitted).

II. The Right To An Impartial Jury Under The Sixth Amendment Must Extend Equally To All Forms Of Juror Bias.

"The Constitution guarantees both criminal and civil litigants a right to an impartial jury." *Warger*, 135 S. Ct. at 528 (citing *Sheppard v. Maxwell*, 384 U.S. 333, 362 (1966); *Thiel v. Southern Pacific Co.*, 328 U.S. 217, 220 (1946)). "The bias or prejudice of even a single juror is enough to violate that guarantee," *United States v. Gonzalez*, 214 F.3d 1109, 1111 (9th Cir. 2000), because a defendant is "entitled to be tried by 12, not 9 or even 10, impartial and unprejudiced jurors," *Parker v. Gladden*, 385 U.S. 363, 366 (1966). That is why, as explained above, any form of bias implicates a defendant's Sixth Amendment right to an impartial jury.

The Sixth Amendment is violated, for example, by bias based on religion, *see, e.g.*, *United States v. Nelson*, 277 F.3d 164, 201-02 (2d Cir. 2002), nationality, *see, e.g.*, *United States v. Hayat*, 710 F.3d 875, 886 (9th Cir. 2013), sexual orientation, *see, e.g.*, *United States v. Bates*, 590 F. App'x 882, 887 (11th Cir. 2014), political views, *see, e.g.*, *United States v. Nell*, 526 F.2d 1223, 1227-30 (5th Cir. 1976), prior relationships, *see, e.g.*, *Bailey v. Bd. of Cty. Comm'rs of Alachua Cty., Fla.*, 956 F.2d 1112, 1128 (11th Cir. 1992), and a prior criminal record, *see, e.g.*, *United States v. Corey*, 625 F.2d 704, 707-08 (5th Cir. 1980) (per curiam). By definition, then, adopting Petitioner's proposal would treat similarly situated defendants differently.

Those defendants claiming racial bias will be granted post-verdict rights that defendants claiming all other forms of juror bias and misconduct do not have. Nothing in the text, structure, or history of the Sixth Amendment supports the exception that Petitioner seeks.

Petitioner tries to distinguish other forms of bias "on the ground that racial bias is a more serious and fundamental danger to the justice system." *Benally*, 546 F.3d at 1240-41. But the argument is non-responsive to the interpretative question. His argument is "that Rule 606(b) is unconstitutional ... in a case where it prevents rectification of a Sixth Amendment violation." *Id.* It is thus Petitioner's burden to show how that proposition can "be confined to the context of racial prejudice." *Id.* He cannot. The Sixth Amendment does not distinguish between a defendant convicted by a juror harboring racial bias and a defendant convicted by a juror harboring religious bias. *See, e.g.*, *United States v. Abcasis*, 811 F. Supp. 828, 834-35 (E.D.N.Y. 1992) (Rule 606(b) barred post-verdict review of a juror's comment that "Jews are responsible for bringing drugs into the Black community"). Nor does the Sixth Amendment distinguish between biased jurors, on the one hand, and those who are drunk or under the influence of illegal drugs, on the other. *Tanner*, 483 U.S. at 1236 ("This Court has recognized that a defendant has a right to 'a tribunal both impartial and mentally competent to afford a hearing.'" (citation omitted)).

But even if Petitioner's argument were doctrinally sound, it creates intractable line-drawing problems. Petitioner claims the "Court has repeatedly recognized that addressing the particular toxin of racial bias in the criminal justice system does not compel the judiciary to

police all potential forms of bias." Pet. Br. 42. For example, although the Court has endorsed questioning potential jurors on the issue of racial bias in some instances, it has not required courts to "permit defendants to inquire into other forms of bias—such as 'prejudice against beards' or 'a host of other possible similar prejudices.'" *Id.* at 43 (quoting *Ham*, 409 U.S. at 528).

Petitioner attacks a strawman. Perhaps "beard prejudice" exists, but it is unlikely to be a frequent or substantial concern in many cases. But the existence of other significant biases, which no doubt influence deliberations and verdicts, is unquestionable. *See generally* Lucy Fowler, *Gender and Jury Deliberations: The Contributions of Social Science*, 12 Wm. & Mary J. Women & L. 1, 21 (2005) (outlining extensive social science research showing gender bias on juries). Studies show, for example, that women are more likely to convict defendants in rape cases. *See* Reid Hastie *et al.*, Inside the Jury 140-141 (1983). "Women have also suggested longer sentences for rape defendants than men, and women expressed greater certainty about their verdicts in rape cases." Fowler, *supra*, at 21. Men tend to "exculpate defendants by shifting blame to the victim." *Id.* And men are less likely to credit a battered woman's defense in murder cases than are women. *Id.* at 22-23. Thus, "to say that gender makes no difference as a matter of law is not to say that gender makes no difference as a matter of fact." *J.E.B.*, 511 U.S. at 149 (O'Connor, J., concurring).

The same is true for other types of bias. Studies show that discriminatory attitudes toward gays and lesbians are a factor in jury verdicts. *See generally* Jennifer M. Hill, *The Effects of Sexual Orientation in the Courtroom:*

A Double Standard, 39:2 J. of Homosexuality 93 (2000). And multiple studies have shown "that defendants with one or more prior convictions are more likely to be found guilty by deliberating jurors." Dennis J. Devine *et al.*, *Jury Decision Making*, 7 Psychol. Pub. Pol'y & L. 622, 678 (2011). Indeed, a jury's knowledge of a defendant's prior conviction raises the likelihood of conviction by 40 percent. *See id.* Petitioner would ignore these difficult questions in favor of a rule that makes value judgments about particular forms of juror bias. This is neither fair nor consistent with the Sixth Amendment.

In retreat, Petitioner argues that "[e]ven when this Court has elected to extend a constitutional criminal procedure right beyond *racial* bias, it has encountered little difficulty limiting the protection to special categories of bias." Pet. Br. 43. But Petitioner's only example is the limited extension of *Batson* to gender. *See id.* That example proves the opposite. Lower courts have struggled to confine *Batson* to race and gender because the rule's underlying principle—that "prejudices often exist against particular classes in the community ... [and] operate in some cases to deny to persons of those classes the full enjoyment of [jury] protection," *Miller-El v. Dretke*, 545 U.S. 231, 237 (2005) (citation omitted)—applies to peremptory strikes that target any subset of the population. *See, e.g.*, *United States v. Brown*, 352 F.3d 654, 668 (2d Cir. 2003) (extending *Batson* to peremptory strikes based on religion); *SmithKline Beecham Corp. v. Abbott Labs.*, 740 F.3d 471, 486 (9th Cir. 2014) (sexual orientation); *State v. Gould*, 322 Conn. 519, 532 (2016) (ancestry and national origin); *see also United States v. Ruiz*, 49 M.J. 340, 350 (C.A.A.F. 1998) ("Before long, *Batson* will presumably be further extended to include religion, national origin, and other classifications.").

As the trajectory of *Batson* claims demonstrates, it will be difficult (if not impossible) to confine the exception Petitioner proposes to claims of bias, let alone racial bias. There is no "principled reason to limit the exception only to claims of bias, when other types of jury misconduct undermine a fair trial as well." *Benally*, 546 F.3d at 1241. "If a jury does not follow the jury instructions, or ignores relevant evidence, or flips a coin, or falls asleep, then surely that defendant's right to a fair trial would be aggrieved." *Id.* The only viable path—if the Court accepts Petitioner's argument—is the creation of a full-scale Sixth Amendment exception to Rule 606(b) for all instances of juror misconduct. In other words, the Court would need to overturn *Tanner* and *Warger* in deed if not in name; there would be "nothing left of the Rule, and the great benefit of protecting jury decision-making from judicial review would be lost." *Id.*

That would be an unwise step for the Court to take. Though overturning these cases might "in some instances lead to the invalidation of verdicts reached after irresponsible or improper jury behavior," *Tanner*, 483 U.S. at 120, "[i]t is not at all clear ... that the jury system could survive such efforts to perfect it," *id.* It remains as true today as the day *Tanner* was decided that "[a]llegations of juror misconduct ... raised for the first time days, weeks, or months after the verdict seriously disrupt the finality of the process." *Id.* And it is still true that "full and frank discussion in the jury room, jurors' willingness to return an unpopular verdict, and the community's trust in a system that relies on the decisions of laypeople would all be undermined by a barrage of postverdict scrutiny of juror conduct." *Id.* at 120-21. "[M]ore than 150,000 jury trials take place each year in the United States" with the

accompanying "[h]undreds of thousands of U.S. Citizens" serving on those juries. Devine, *supra*, at 622. Permitting a post-verdict inquiry into jurors' deliberations would undermine the jury system. The Court should once again reject an attempt to start down that path.

CONCLUSION

The Court should affirm the judgment below.

Respectfully submitted,

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MIGUEL ANGEL PEÑA RODRIGUEZ,
Petitioner,

v.

STATE OF COLORADO,
Respondent.

On Writ of Certiorari to the Colorado Supreme Court

BRIEF OF CONSTITUTIONAL ACCOUNTABILITY CENTER AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

Amicus Constitutional Accountability Center (CAC) is a think tank, public interest law firm, and action center dedicated to fulfilling the progressive promise of our Constitution's text and history. CAC works in our courts, through our government, and with legal scholars to improve understanding of the Constitution and preserve the rights and freedoms it guarantees. CAC has a strong interest in ensuring that the Constitution applies as robustly as its text and history require and accordingly has an interest in this case.

INTRODUCTION AND SUMMARY OF ARGUMENT

Central to the constitutional guarantee that all persons are entitled to a "speedy and public" trial by jury is the idea that the members of that jury must be "impartial." Made explicit in the constitutional text itself, this commitment to an "impartial" jury reflects the Framers' belief that a defendant should be convicted of a crime based solely on the evidence presented at trial, not on preexisting juror biases or preconceptions. As Chief Justice John Marshall wrote, "The great value of the trial by jury certainly consists in its fairness and impartiality. Those who most prize the institution, prize it because it furnishes a

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[1] The parties have consented to the filing of this brief and their letters of consent have been filed with the Clerk. Under Rule 37.6 of the Rules of this Court, *amicus* states that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus* or its counsel made a monetary contribution to its preparation or submission.

tribunal which may be expected to be uninfluenced by an undue bias of the mind." *United States v. Burr*, 25 F. Cas. 49, 50 (C.C.D. Va. 1807). This case presents allegations of juror bias that, if credited, leave no doubt that the defendant's Sixth Amendment right to an impartial jury was violated. Applying a state no-impeachment rule in this context and thereby allowing this potential constitutional violation to go unaddressed, as the Colorado Supreme Court did, undermines this nation's longstanding historical and constitutional commitment to race-blind decision-making in the jury context. The judgment of the Colorado Supreme Court should be reversed.

In May 2007, a man entered a women's bathroom at a horse-racing track and asked two teenage sisters inside if they wanted to drink beer or "party." When they said no, the man turned off the lights, grabbed one girl's shoulder and unsuccessfully tried to touch her breast, and grabbed the other girl's shoulder and buttocks. The sisters reported the incident to their father, an employee of the racetrack; based on their description of the assailant, he concluded that it was petitioner Miguel Angel Peña Rodriguez. Late that night, the girls identified Peña Rodriguez as their assailant based on a show-up in which Peña Rodriguez was standing on the side of the road and the girls were in a police cruiser, about fifteen feet away.

Based on the incident, Peña Rodriguez was charged with four offenses: one felony count of attempted sexual assault on a victim less than fifteen; one misdemeanor count of unlawful sexual contact; and two misdemeanor counts of harassment. Insisting that he had been misidentified, Peña Rodriguez requested a trial. At trial, the prosecution emphasized the victims' pretrial and in-court identifications of Peña Rodriguez, while the defense counsel called

into question the reliability of those identifications. Peña Rodriguez also presented an alibi witness, who testified that he was with Peña Rodriguez when the offenses occurred. The prosecution encouraged the jury to "'[w]eigh the credibility of the girls against [the credibility of the alibi witness].'" Pet'r's Br. 6 (quoting Tr. 48 (Feb. 25, 2010)).

Although the jury was initially unable to reach a verdict, the judge urged the jury to keep deliberating. After twelve total hours of deliberations, the jury convicted Peña Rodriguez on the three misdemeanor charges; the jury was unable to reach a verdict on the felony charge. After the jury was dismissed, two of its members spoke to defense counsel and explained that during deliberations another juror had "'expressed a bias toward [Petitioner] and the alibi witness because they were Hispanic.'" Pet. App. 4a. According to these jurors, the other juror said that the defendant "'did it because he's Mexican and Mexican men take whatever they want,'" and that "'Mexican men had a bravado that caused them to believe they could do whatever they wanted with women.'" *Id.*; *see id.* ("'Mexican men [are] physically controlling of women because they have a sense of entitlement and think they can 'do whatever they want' with women.'"). Finally, these jurors reported that the other juror also discounted the testimony of Peña Rodriguez's alibi witness, saying he was not "credible because, among other things, he was 'an illegal,'" *id.* at 4a-5a (internal quotation marks omitted), even though the witness had testified at trial that he was a legal resident, Pet'r's Br. 8.

Despite these allegations that racial prejudice infected the jury's verdict, the trial court concluded that nothing could be done because Colorado's no-impeachment rule barred inquiry into "'what hap-

pen[ed] in the jury room.'" Pet'r's Br. 9 (quoting J.A. 125). Divided panels of both the Colorado Court of Appeals and the Colorado Supreme Court affirmed. Pet. App. 28a; *see id.* at 1a. *Amicus* submits this brief to demonstrate that allowing no-impeachment rules to bar evidence of racial prejudice in jury deliberations is at odds with this nation's longstanding historical and constitutional commitment to jury deliberations that are free of racial bias.

When the Framers drafted our enduring charter, they enshrined the right to a jury trial in the original Bill of Rights, U.S. Const. amend. VI, viewing it as critical to a system of ordered liberty, *see* Akhil Reed Amar, *The Bill of Rights: Creation and Reconstruction* 96-97 (1998) ("[A] paradigmatic image underlying the original Bill of Rights," the "jury summed up—indeed embodied—the ideals of populism, federalism, and civic virtue that were the essence of the original Bill of Rights."). As the Amendment's text makes clear, critical to the Framers' conception of a jury was the idea that it be "impartial," U.S. Const. amend VI ("the accused shall enjoy the right to a speedy and public trial, by an impartial jury"), capable of reaching verdicts based only on the evidence presented in court and not on preconceived biases about the parties.

Although the Framers' original conception of bias focused on jurors who knew one of the parties or had some other interest in the case, the Constitution's explicit requirement that jurors be "impartial" also prohibits jurors who have racial biases or prejudices that would affect their ability to dispassionately assess the evidence presented in court. Indeed, in the aftermath of the Civil War, experiences in the South "challenged" the "colonial belief that the jury was a bulwark of liberty," as it became clear that racial biases

were infecting jury deliberations with "[a]ll-white juries punish[ing] black defendants particularly harshly, while simultaneously refusing to punish violence by whites against blacks and Republicans." James Forman, Jr., *Juries and Race in the Nineteenth Century*, 113 Yale L.J. 895, 909-10 (2004). In response, Congress passed two pieces of legislation designed to guard against racial prejudices infecting Southern juries: the Civil Rights (Ku Klux Klan) Act of 1871, which "denied jury eligibility to persons who had conspired to deny the civil rights of blacks," Forman, *supra*, at 923, and the Civil Rights Act of 1875, which guaranteed black Americans the right to serve on juries, *id.* at 926, 930.

Throughout the debates over these pieces of legislation, the bills' proponents made clear that racial bias in jury decision-making was intolerable, running afoul of both the Sixth Amendment's guarantee of an "impartial" jury, U.S. Const. amend. VI, and the newly adopted Fourteenth Amendment's promise that all persons should enjoy the "equal protection of the laws," *id.* amend. XIV, § 1. Invoking the Constitution's guarantee that "every man shall have a trial by an impartial jury," Senator John Sherman of Ohio asked "what kind of trial would that be to which you would subject four millions of the people of the United States in the southern States, where by the law of some of them every man of that race is excluded from sitting as a juryman on a trial?" Cong. Globe, 42d Cong., 2d Sess. 844 (1872). And Senator Oliver Morton of Indiana asked "whether the colored men have the equal protection of the laws when the control of their right to life, liberty, and property is placed exclusively in the hands of another race of men, hostile to them, in many respects prejudiced against them, men who have been educated and

taught to believe that colored men have no civil and political rights that white men are bound to respect." 3 Cong. Rec. 1795 (1875) (statement of Sen. Morton). Answering his own question, Senator Morton explained that the "common sense of mankind [would] revolt at that proposition." *Id.* In sum, these debates reflected the strong conviction that the Constitution does not tolerate racial prejudice or bias in the administration of the nation's justice system.

This Court has also long recognized that racial bias in the administration of justice, including in jury decision-making, cannot be squared with our constitutional guarantee of impartial juries and equal protection under the law. *See Rose v. Mitchell*, 443 U.S. 545, 555 (1979) (plurality opinion) ("[d]iscrimination on the basis of race, odious in all aspects, is especially pernicious in the administration of justice"). Reflecting the importance of eliminating all racial bias from the administration of justice, the Court has repeatedly taken steps to eliminate purposeful racial discrimination at multiple stages of the jury selection process, holding for example that it is unconstitutional to discriminate against individuals in forming grand or petit juries. *See Strauder v. West Virginia*, 100 U.S. 303 (1879), *abrogated by Taylor v. Louisiana*, 419 U.S. 522 (1975); *Hernandez v. Texas*, 347 U.S. 475 (1954). Significantly, the Court has also held that there are contexts in which it is permissible to question potential jurors about whether they harbor any racial prejudices. As this Court has noted, "if any [juror] was shown to entertain a prejudice which would preclude his rendering a fair verdict, a gross injustice would be perpetrated in allowing him to sit." *Aldridge v. United States*, 283 U.S. 308, 314 (1931).

Notwithstanding this strong constitutional and historical commitment to the race-blind administration of justice, Peña Rodriguez was likely convicted of a crime by a jury in which someone "was shown to entertain a prejudice," *id.*, simply because Colorado's no-impeachment rule barred inquiry into what had happened in the jury room. This is wrong. Allowing Colorado's no-impeachment rule to trump Peña Rodriguez's Sixth Amendment right to an impartial jury and his Fourteenth Amendment right to the equal protection of the laws would undermine our constitutional and historical commitment to race-blind jury deliberations. This Court should reaffirm that racial prejudice has no place in our justice system and hold that no-impeachment rules cannot be applied constitutionally in the context of allegations of racial bias.

ARGUMENT

THE COURT SHOULD HOLD THAT A NO-IMPEACHMENT RULE MAY NOT BAR EVIDENCE OF RACIAL BIAS OFFERED TO PROVE A SIXTH AMENDMENT VIOLATION

I. THE SIXTH AND FOURTEENTH AMENDMENTS TOGETHER REFLECT A CONSTITUTIONAL COMMITMENT TO RACE-BLIND DECISION-MAKING IN THE JURY CONTEXT

The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed." U.S. Const. amend. VI. Strongly rooted in the English common law, 4 William Blackstone, *Commentaries* *350 (jury is a "sacred bulwark" of liberty); *see* 3 *id.* at 379 ("the most transcendent privilege which any subject can enjoy,

or wish for, [is] that he cannot be affected either in his property, his liberty, or his person, but by the unanimous consent of twelve of his neighbours and equals[v]), this jury guarantee was of paramount importance to the Framers, who viewed it as a central feature of a system of ordered liberty, *see* Amar, *supra*, at 96-97 ("[A] paradigmatic image underlying the original Bill of Rights," the "jury summed up—indeed embodied—the ideals of populism, federalism, and civic virtue that were the essence of the original Bill of Rights."); *see also* 2 Joseph Story, *Commentaries on the Constitution of the United States* 558 (5th ed. 1891) (describing jury as "the great bulwark of [our] civil and political liberties").

As the Amendment's text makes clear, critical to the Framers' conception of a jury was the belief that members of the jury should be impartial, that is, free of bias toward or against any of the parties. At common law, the proscription against bias was commonly used to prohibit jurors from serving if they were related to one of the parties or had some other interest in the case. According to Blackstone, "[j]urors may be challenged *proper affectum*, for suspicion of bias or partiality. A *principal* challenge is such where the cause assigned carries with it *prima facie* evident marks of suspicion either of malice or favour: as, that a juror is of kin to either party within the ninth degree; that he has been arbitrator on either side; that he has an interest in the cause; that he is the party's master, servant, counsellor, steward, or attorney, or of the same society or corporation with him." 3 Blackstone, *supra*, at 363; *see* 3 J.H. Thomas, *A Systematic Arrangement of Lord Coke's First Institute of the Laws of England* 365 (1836) ("He that is of a jury must be *liber homo*, that is, not only a freeman and not bond, but also one that hath such freedom of

mind as he stands indifferent as he stands unsworn."). Chief Justice Marshall subsequently echoed these concerns about jury impartiality, explaining that "the most distant relative of a party cannot serve upon his jury" because "the law suspects the relative of partiality; suspects his mind to be under a bias, which will prevent his fairly hearing and fairly deciding on the testimony which may be offered to him." *Burr*, 25 F Cas. at 50; *id.* ("The end to be obtained is an impartial jury; to secure this end, a man is prohibited from serving on it whose connexion with a party is such as to induce a suspicion of partiality.").

This longstanding constitutional commitment to impartial juries, together with the Fourteenth Amendment's guarantee of equal protection of the laws, also prohibits jurors who have a bias toward or against any of the parties because of the party's race. The original meaning of the Fourteenth Amendment's equal protection guarantee "establishes equality before the law, and it gives to the humblest, the poorest, the most despised of the race the same rights and the same protection before the law as it gives to the most powerful, the most wealthy, or the most haughty." Cong. Globe, 39th Cong., 1st Sess. 2766 (1866) (statement of Sen. Jacob Howard). The constitutional guarantee of equality "protects the black man in his fundamental rights as a citizen with the same shield which it throws over the white man." *Id.*

The Framers of the Fourteenth Amendment were particularly concerned about racial discrimination in the administration of criminal justice. In the aftermath of the Civil War, Southern states turned a blind eye to the daily "acts of cruelty, oppression and murder," *see Report of the Joint Committee on Reconstruction, at the First Session Thirty-Ninth Congress* xvii (1866), that Southern whites perpetrated to terrify

and intimidate the newly freed slaves and their allies. "Witness after witness spoke of beatings and woundings, burnings and killings, as well as deprivations of property and earnings and interference with family relations—and the impossibility of redress or protection . " Jacobus tenBroek, *Equal Under Law* 203-04 (1965). These experiences in the South "challenged" the "colonial belief that the jury was a bulwark of liberty." Forman, *supra*, at 909-10.

A key aspect of the problem was juror bias. Witnesses told the Joint Committee on Reconstruction that "since the surrender and coming home of the rebels, there is less chance for getting a jury who will act justly." *Report of the Joint Committee on Reconstruction* pt. 2, *supra*, at 33. Indeed, "[a]ll-white juries punished black defendants particularly harshly, while simultaneously refusing to punish violence by whites against blacks and Republicans." Forman, *supra*, at 909-10. According to the testimony of southern judges, "[i]n nine cases out of ten the men who commit the crimes constitute or sit on the grand jury, either they themselves or their near relatives or friends, sympathizers, aiders, or abettors; and if a bill is found it is next to impossible to secure a conviction upon a trial at the bar." Cong. Globe, 42d Cong., 1st Sess. 158 (1871) (statement of Sen. Sherman quoting Judge Russel, 4th Dist.) (internal quotation marks omitted).

Over the course of Reconstruction, the Framers of the Reconstruction Amendments repeatedly acted to ensure the existence of impartial juries that would fairly apply the law to all regardless of race. Recognizing that juror bias violated both the Sixth Amendment's guarantee of an "impartial jury" and the Fourteenth Amendment's promise that no person would be denied "equal protection of the laws," U.S.

Const. amend. XIV, § 1, Ohio Senator John Sherman called for action to enforce these constitutional guarantees, stating that some sort of response was necessary if the United States "intend[ed] to retain a republican form of government." Cong. Globe, 42d Cong., 1st Sess. 157 (1871). Action first came in the form of the Civil Rights (Ku Klux Klan) Act of 1871, ch. 22, 17 Stat. 13 (codified as amended in scattered sections of 10, 18, 28, and 42 U.S.C.). Although the "principal targets" of the Act were "the Klan itself and the violence it perpetuated," Forman, *supra*, at 920, proponents of the legislation also sought to address the Southern state governments' failure to punish the Klan, Cong. Globe, 42d Cong., 1st Sess. App. 252 (1871) (statement of Sen. Morton) ("None of its members have been punished "). As Senator Sherman noted, "there is another remarkable feature of this whole proceeding, and that is that from the beginning to the end in all this extent of territory no man has ever been convicted or punished for any of these offenses, not one." Cong. Globe, 42d Cong., 1st Sess. 157-58 (1871).

Proponents of the legislation recognized that a principal reason why Klan members went unpunished "was the failure of Southern juries to punish violence against blacks and Republicans." Forman, *supra*, at 921; *see, e.g.*, Cong. Globe, 42d Cong. 1st Sess. 158 (1871) (Judge Settle of the North Carolina Supreme Court explaining that "[t]he defect lies not so much with the courts as with the juries"). As one scholar reports, "Ku Klux Klan members candidly acknowledged their willingness to disobey the law as jurors in defense of one another." Forman, *supra*, at 921; *id.* (quoting Klansman who explained that "if we could get on the jury we could save [the defendant]"). Thus, Section 5 of the Act "denied jury eligibility to

persons who had conspired to deny the civil rights of blacks, and provided for penalties for those who perjured themselves during jury selection." *Id.* at 923.

The Act produced marked successes, excluding prejudiced whites from juries and allowing black Americans to take their place; as a result, Klan members were convicted in large numbers for the first time. *Id.* at 925. Although the federal government ultimately "scale[d] back its Klan prosecutions," *id.* at 926, these early successes of the Act helped demonstrate that the problem was, as Judge Settle had noted, "not so much with the courts as with the juries," Cong. Globe, 42d Cong., 1st Sess. 158 (1871).

The Civil Rights Act of 1871 was not the only Reconstruction-era legislation introduced to address the problem of Southern juries that were infected by racial bias. In 1870, Senator Charles Sumner of Massachusetts introduced legislation to "prohibit[] discrimination in the selection of jurors and provid[e] penalties for officials who disobeyed." Forman, *supra*, at 926; *see id.* at n.160 ("no person shall be disqualified for service as juror in any court, national or State, by reason of race, color, or previous condition of servitude" (quoting S. 916, 41st Cong. § 4 (1870))).[2]

During debates over Sumner's proposed legislation, proponents of the bill made clear that jury deliberations free of racial bias were central to the con-

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[2] Notably, some calls for black Americans to be able to serve on juries came even earlier, and these calls, too, stressed the need to eliminate racial prejudice from the justice system. *See, e.g.*, Forman, *supra*, at 916 (discussing Representative William Kelley of Pennsylvania reading into the record in 1865 an editorial by the black *New Orleans Tribune*, which asked, "Why have we no representatives on the jury? Are our lives, honor, and liberties to be left in the hands of men who are laboring under the most stubborn and narrow prejudice?").

stitutional guarantee of impartial juries.[3] According to many supporters of the bill, the right to serve on a jury was not an "independent right, but one that stemmed from the defendant's right to a fair trial." Forman, *supra*, at 927; *see* Cong. Globe, 42d Cong., 2d Sess. 845 (1872) (statement of Sen. Sherman) ("it is the right of all men to have a fair law and rule by which men of their own race and occupation and color may serve on a jury"). Indeed, proponents of the legislation repeatedly made clear that a jury could not be impartial if blacks could not serve. As Senator Sherman noted, "[t]he Constitution of the United States declares that every man shall have a trial by an impartial jury—not of his peers, in the old language of the English law, but an impartial jury. The meaning is the same. Now, what kind of trial would that be to which you would subject four millions of the people of the United States in the southern States, where by the law of some of them every man of that race is excluded from sitting as a juryman on a trial? Is that an impartial jury?" *Id.* at 844 (statement of Sen. Sherman).

Senator Morton also referenced the Framers' commitment to an impartial judiciary and the relevance of that concept to contemporary debates about the racial composition of juries: "[O]ne of the most important principles of the common law that has

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[3] Even some opponents of the legislation acknowledged the importance of jury impartiality. Senator Stevenson, for example, believed blacks would be treated fairly by all-white juries, but expressed concern about whether the same could be said for members of other minority groups. "What becomes of a Chinamen who commits murder today in San Francisco or Sacramento?" he asked. "What right of justice can he expect from twelve white men prejudiced against him and opposed bitterly to the immigration of his people?" Cong. Globe, 42 Cong., 2d Sess. 913 (1872) (statement of Sen. Stevenson).

come down to us from our fathers, established in England long ago, was that every man had a right to be tried by his peers. And we see how carefully this principle of trial by jury is guarded. Now, I ask if with the prejudices against the colored race entertained by the white race, even in some of the Northern States and certainly in all of the Southern States, the colored man enjoys the equal protection of the laws, if the jury that is to try him for a crime or determine his right to property must be made up exclusively of the white race?" 3 Cong. Rec. 1793 (1875) (statement of Sen. Morton).

Senator George Edmunds of Vermont made a similar point, stressing the importance of allowing black Americans to serve on juries to ensure the equality they had just been guaranteed by the Fourteenth Amendment:

> What, sir, is more necessary to peace and security in the administration of justice in the southern States than that [colored people] should have the constitutional right to participate in the administration of justice? Where would be the value of declaring that a colored man should have equal rights of trial by jury and equal rights of judgment by his peers, if you are to say that the jurors are to be composed of the Ku Klux, and that the only status the colored man shall have in court, shall be that he shall stand either as a respondent or it may be as a witness? You are to put him into the hands of his enemies for trial.

Cong. Globe, 42d Cong., 2d Sess. 900 (1872) (statement of Sen. Edmunds); *see id.* at 847 (statement of Sen. Morton) ("Take the case of the State of Kentucky

where colored men are not allowed to sit upon a jury. A colored man is placed upon trial. He is to be tried by a jury of white men, perhaps for a wrong inflicted upon a white person. He is to be tried by a jury that have prejudices of race against him, that are now especially, and have been for a few years past excited against him because he has been attempted to be clothed with new rights. I ask if this colored man, to be tried by a jury of white men from which all colored men are excluded, can be said in any sense to have 'the equal protection of the law?'"); *id.* at 898 (statement of Sen. Morton) ("[I]f a quarter of a million of colored men in Kentucky have no right to sit upon a jury, it cannot be said that they have the equal protection of the laws It is class legislation of the worst kind.").

Other members of Congress also spoke about the difficulties in securing justice for both black plaintiffs and defendants, saying, "Every colored man suing for his wages brings his case before a jury who are prejudiced against him because of his color. Every colored man tried as a criminal appears before a jury who are inclined to believe him guilty because of his race " 2 Cong. Rec. 427 (1874) (statement of Rep. Stowell); 3 Cong. Rec. 1863 (1875) (statement of Sen. Morton) ("[T]o give the exclusive right to white men to sit upon juries and to adjudicate upon the rights of colored men is denying to colored men the equal protection of the laws, because it is placing the adjudication of their rights exclusively in the hands of another race, filled with a prejudice and passion in many States that would prevent them from doing justice."). One Senator even invoked Justice Strong who in 1874 spoke from the bench about the inability of black Americans to receive a fair trial: "It is also well known that in many quarters prejudices existed

against the colored race, which naturally affected the administration of justice in the State courts, and operated harshly when one of that race was a party accused." 2 Cong. Rec. 4148 (1874) (statement of Sen. Howe) (quoting *Blyew v. United States*, 80 U.S. 581, 593 (1871)); *see* Cong. Globe, 42d Cong., 2d Sess. 489 (1872) (statement of Sen. Sawyer) (expressing the hope that Senator Sumner's bill would provide a "remedy for" the fact that there were probably cases "where judges and juries fail to prove the guardians of the colored man's rights and privileges which it behooves them to be").

During debates over Senator Sumner's bill, black Americans living in the South also advised members of Congress that "it is almost if not quite impossible for a black man to obtain justice" in Southern courts because "the lives, liberties, and property of black men have been decided by grand and petit juries composed exclusively of white men who are their political opponents." Message from the President of the United States, Transmitting a Memorial of a Convention of Colored Citizens Assembled in the City of Montgomery, Ala. on December 2, 1874, H. Exec. Doc No. 46, at 4-5 (1874). They elaborated that

> from the antipathies and prejudices of race, which are generally inflamed by artful and sometimes by undisguised appeals by counsel to these passions, it results that our race is deprived of their constitutional right under the constitution of the State to a trial by an 'impartial jury,' and of our right under the 13th and 14th amendments to the Constitution of the United States 'to the equal protection of the laws.'

Id. at 5; *id.* ("Our lives, liberties, and properties are made to hang upon the capriciousness, perilous, and prejudiced judgments of juries composed of a hostile community of ex-slaveholders who disdain to recognize the colored race as their peers in anything, who look upon us as being *by nature an inferior race*, and by right their chattel property"); *id.* at 8 ("When this mode of trial becomes, as it has, in this State, the trial of a black man or his rights before a jury composed exclusively of a different and a hostile race, having no sympathies with him, but race antipathies and prejudices against him, it becomes worse than a mockery, and is the surest means of accomplishing his ruin and the subversion of right and justice.").

The day before the Senate finally passed Senator Sumner's bill, what became the Civil Rights Act of 1875, Senator Morton gave a rousing speech in which he captured the spirit of the legislation. In response to an opponent of the bill, Senator Morton asked

> whether the colored men have the equal protection of the laws when the control of their right to life, liberty, and property is placed exclusively in the hands of another race of men, hostile to them, in many respects prejudiced against them, men who have been educated and taught to believe that colored men have no civil and political rights that white men are bound to respect.

3 Cong. Rec. 1795 (1875) (statement of Sen. Morton). In answer to his own question, Senator Morton responded that the "common sense of mankind [would] revolt at that proposition" that black men actually have the equal protection of the laws in such a scenario. *Id.*; *see also id.* at 1864 (statement of Sen. Morton) ("[T]o place the administration of the law ex-

clusively in the hands of white men is to deny to colored men an equal protection of the laws").

In sum, as this history indicates, the constitutional commitment to "impartial" juries, as reflected in the text of the Sixth Amendment, as well as the constitutional guarantee of equal protection contained in the Fourteenth Amendment, have long been understood to require juries that are not infected by racial prejudice and bias. As the next Section discusses, this deep historical commitment has long been reflected in this Court's cases as well.

II. THIS COURT'S CASES HAVE LONG REFLECTED THE IMPORTANCE OF RACE-BLIND DECISIONMAKING IN THE JURY CONTEXT

This Court has long recognized that racial prejudice in the jury system violates both the Sixth and Fourteenth Amendments because "[d]iscrimination on the basis of race, odious in all aspects, is especially pernicious in the administration of justice." *Mitchell*, 443 U.S. at 555 (plurality opinion); *id.* at 556 ("[S]uch discrimination 'not only violates our Constitution and the laws enacted under it but is at war with our basic concepts of a democratic society and a representative government.'" (quoting *Smith v. Texas*, 311 U.S. 128, 130 (1940) (footnote omitted))).

Five years after the passage of the Civil Rights Act of 1875, this Court confirmed the Framers' understanding of the constitutional guarantee of equality, holding that a state statute excluding African Americans from jury service "is practically a brand upon them, affixed by the law, an assertion of their inferiority, and a stimulant to that race prejudice which is an impediment to securing to individuals of the race that equal justice which the law aims to se-

cure to all others." *Strauder*, 100 U.S. at 308. *Strauder* recognized that "[t]he very idea of a jury is a body composed of the peers or equals of the person whose rights it is selected or summoned to determine" and that "[i]t is well known that prejudices often exist against particular classes in the community, which sway the judgment of jurors, and which, therefore, operate in some cases to deny to persons of those classes the full enjoyment of that protection which others enjoy." *Id.* at 308, 309. The "apprehension that through prejudice [racial minorities] might be denied equal protection," *id.* at 309, has guided this Court's jurisprudence since.

To guard against racial discrimination in the justice system, this Court has repeatedly recognized the importance of eliminating purposeful racial discrimination at all stages of the jury selection process. For example, the Court "has long recognized that 'it is a denial of the equal protection of the laws to try a defendant of a particular race or color under an indictment issued by a grand jury from which all persons of his race or color have, solely because of that race or color, been excluded by the State." *See Castaneda v. Partida*, 430 U.S. 482, 492 (1977) (quoting *Hernandez*, 347 U.S. at 477); *Cassell v. Texas*, 339 U.S. 282, 282-83 (1950) (violation of the "federal constitutional right to a fair and impartial grand jury" when an African American was indicted by a grand jury from which African Americans were "intentionally excluded"). As a plurality of the Court recognized in *Rose v. Mitchell*, 443 U.S. 545 (1979), excluding members of a particular race from the grand jury "destroys the appearance of justice and thereby casts doubt on the integrity of the judicial process" and "strikes at the fundamental value of our judicial system and our society as a whole." *Mitchell*, 443 U.S. at

555-56; *see also Vasquez v. Hillery*, 474 U.S. 254, 262 (1986) (reaffirming *Rose* and calling "intentional discrimination in the selection of grand jurors" a "grave constitutional trespass").

Similarly, this Court has held that discrimination in selecting the petit jury pool is constitutionally impermissible based on both the Fourteenth Amendment and the Sixth Amendment right to a jury reflecting a fair cross section of the community. *See, e.g., Taylor*, 419 U.S. 522. In *Taylor*, the Court reversed the petitioner's conviction because the state court that tried him had engaged in a pattern of excluding women from the jury pool even though women constituted fifty-three percent of the population. As the Court explained, "[t]he purpose of a jury is to guard against the exercise of arbitrary power . This prophylactic vehicle is not provided if large, distinctive groups are excluded from the pool." *Taylor*, 419 U.S. at 530 (citation omitted); *id.* ("'[T]he broad representative character of the jury should be maintained as assurance of a diffused impartiality . '" (quoting *Thiel v. S. Pac. Co.*, 328 U.S. 217, 227 (1946) (Frankfurter, J., dissenting))). Although the Court subsequently restricted the fair cross section right to the selection of the jury venire (and not the petit jury itself), *Holland v. Illinois*, 493 U.S. 474 (1990), in doing so the Court reaffirmed *Taylor*'s central premise that the Sixth Amendment prohibits jury pools likely to have a bias against certain classes of defendants. As the Court explained, "[t]he Sixth Amendment requirement of a fair cross section on the venire is a means of assuring an *impartial* [jury] Without that requirement, the State could draw up jury lists in such manner as to produce a pool of prospective jurors disproportionately ill dis-

posed towards one or all classes of defendants "
Holland, 493 U.S. at 480.

The Court has also provided safeguards to try to ensure that individuals who sit on juries carry no racial bias or animus that will conflict with their ability to serve as impartial jurors. In *Aldridge v. United States*, 283 U.S. 308 (1931), the defense asked the trial judge to question prospective jurors about their racial attitudes after learning that in an earlier trial of the same case, a white juror had expressed that the interracial nature of the crime "perhaps somewhat influenced her." *Aldridge*, 283 U.S. at 310. Despite this revelation, the judge forbade the defense counsel from asking any questions about race. This Court held that this decision was erroneous, reasoning that "if any [juror] was shown to entertain a prejudice which would preclude his rendering a fair verdict, a gross injustice would be perpetrated in allowing him to sit." *Id.* at 314. Notably, the Court rejected an argument that questioning jurors about their racial attitudes would undermine the legitimacy of the judicial system, explaining that

> [w]e think that it would be far more injurious to permit it to be thought that persons entertaining a disqualifying prejudice were allowed to serve as jurors and that inquiries designed to elicit the fact of disqualification were barred. No surer way could be devised to bring the processes of justice into disrepute.

Id. at 314-15; *see Ham v. South Carolina*, 409 U.S. 524, 527 (1973) ("the essential fairness required by the Due Process Clause of the Fourteenth Amendment requires that under the facts shown by this record the petitioner be permitted to have the jurors interrogated on the issue of racial bias").

In the years since, even as the Court has made clear that trial courts enjoy discretion when determining whether to permit questioning about potential jurors' racial biases, they can abuse their discretion by denying a defendant's request to examine jurors if there are "substantial indications of the likelihood of racial or ethnic prejudice affecting the jurors in a particular case." *Rosales-Lopez v. United States*, 451 U.S. 182, 190 (1981); *see Turner v. Murray*, 476 U.S. 28, 36, 35 (1986) ("Because of the range of discretion entrusted to a jury in a capital sentencing hearing, there is a unique opportunity for racial prejudice to operate but remain undetected," and "[b]y refusing to question prospective jurors on racial prejudice, the trial judge failed to adequately protect petitioner's constitutional right to an impartial jury"). As this Court has explained, juror questioning can be required when there is a "constitutionally significant likelihood that, absent questioning about racial prejudice, the jurors would not be as 'indifferent as (they stand) unsworne.'" *Ristaino v. Ross*, 424 U.S. 589, 596 (1976) (quoting Coke on Littleton 155b (19th ed. 1832)).

Finally, the Court has also prohibited the exclusion of prospective jurors based on race even when the government otherwise has the discretion to remove jurors. *See Batson v. Kentucky*, 476 U.S. 79 (1986). In *Batson*, the Court explained that discriminatory selection of jurors was unconstitutional because, among other things, it denies defendants the equal protection of the laws. "Those on the venire must be indifferently chosen," the Court explained, "to secure the defendant's right under the Fourteenth Amendment to protection of life and liberty against race or color prejudice." *Batson*, 476 U.S. at 86-87 (internal quotation marks and citations omitted).

The Court also underscored that "[s]election procedures that purposefully exclude black persons from juries undermine public confidence in the fairness of our system of justice." *Id.* at 87; *see Foster v. Chatman*, 136 S. Ct. 1737, 1745-1747 (2016) ("The 'Constitution forbids striking even a single prospective juror for a discriminatory purpose.'" (quoting *Snyder v. Lousiana*, 552 U.S. 472, 478 (2008))).

In short, this Court has repeatedly made clear that racial bias and prejudice are an affront to the constitutional guarantees contained in both the Sixth and Fourteenth Amendments, and that there is no place for such bias in either jury deliberations or in the administration of our justice system more generally.

III. APPLYING STATE NO-IMPEACHMENT RULES IN THE CONTEXT OF ALLEGATIONS OF RACIAL BIAS UNDERMINATES OUR CONSTITUTIONAL COMMITMENT TO RACE-BLIND DECISION-MAKING IN THE JURY CONTEXT

As just discussed, there is a longstanding constitutional and historical commitment to race-blind decision-making in the jury context, and this Court's decisions have repeatedly reflected that commitment. Applying no-impeachment rules in cases, like this one, in which there are allegations of racially prejudiced comments during jury deliberations is at odds with this constitutional commitment and should not be permitted.

The evidence that racial prejudice and bias infected jury deliberations in this case is striking. After the jury returned its verdict convicting Peña Rodriguez, two jurors reported to defense counsel that, during deliberations, another juror had made a num-

ber of statements indicating that he was prejudiced against Mexicans and individuals of Hispanic descent. According to the jurors who spoke to defense counsel, the other juror said that the defendant "'did it because he's Mexican and Mexican men take whatever they want,'" Pet. App. 4a, and that the defendant "'was guilty because [in that juror's] experience as an ex-law enforcement officer, Mexican men had a bravado that caused them to believe they could do whatever they wanted with women,'" *id.*; *see id.* ("'[W]here [that juror] used to patrol, nine times out of ten Mexican men were guilty of being aggressive toward women and young girls.'"). These jurors also reported that the other juror stated that the defendant's alibi witness was not "credible because, among other things, he was an 'an illegal.'" *Id.* at 4a-5a (internal quotation marks omitted). Notably, the alibi witness had testified during trial that he was a legal resident of the United States. Pet'r's Br. 8.

As this Court has made clear, "a defendant has the right to an impartial jury that can view him without [the] racial animus, which so long has distorted our system of criminal justice." *Georgia v. McCollum*, 505 U.S. 42, 58 (1992). If these juror allegations are true, Peña Rodriguez's right to such an impartial jury and to the equal protection of the laws was plainly violated given the juror's preconceptions about Mexicans and Hispanics and his biases against them.

Colorado's asserted justifications for its no-impeachment rule, whatever their merits as a general matter, cannot trump Peña Rodriguez's constitutional right to an impartial jury capable of deciding his case based purely on the evidence presented at trial. *See* Pet'r's Br. 33-39; *see also id.* at 38 ("Given the existing exceptions to [the no-impeachment rule],

a narrow exception for allegations of racial bias does not unduly disturb the finality of verdicts."); Amicus Br. of NAACP Legal Defense & Educational Fund, Inc. et al. 17-19. Moreover, as Peña Rodriguez's brief demonstrates, there is no need to abandon no-impeachment rules altogether; rather, the courts could easily administer an exception to no-impeachment rules for racial bias claims. *See* Pet'r's Br. 29-31, 40-45; *see also id.* at 30 (noting that "over twenty jurisdictions allow juror testimony about racially biased remarks in the jury room"). Such an exception would help safeguard our nation's longstanding commitment to a race-blind justice system that judges people based on the evidence presented at trial, not the color of their skin. It would also ensure that "prejudices against particular classes in the community" do not "sway the judgment of jurors" and deny to racial minorities "the full enjoyment of that protection which others enjoy." *Strauder*, 100 U.S. at 309. As this Court has explained, "[d]iscrimination on the basis of race, odious in all aspects, is especially pernicious in the administration of justice." *Mitchell*, 443 U.S. at 555. This Court should hold that courts cannot apply no-impeachment rules in contexts in which doing so would allow verdicts based on racial discrimination to stand, and it should hold that the Colorado Supreme Court was wrong to do so here.

CONCLUSION

For the foregoing reasons, the judgment of the Colorado Supreme Court should be reversed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

MIGUEL ANGEL PEÑA-RODRIGUEZ,
Petitioner,

vs.

STATE OF COLORADO,
Respondent.

On Writ of Certiorari to the Supreme Court of Colorado

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF RESPONDENT

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QUESTIONS PRESENTED

1. Whether the Colorado Supreme Court properly held that the exclusion of juror testimony alleging racial bias during deliberations pursuant to Rule 606(b) of the Colorado Rules of Evidence is consistent with a defendant's right to an impartial jury.

2. Whether the Sixth Amendment compels an implicit exception to the no-impeachment rule for evidence of racially biased statements, but not for evidence of other types of prejudice.

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IN THE

Supreme Court of the United States

MIGUEL ANGEL PEÑA-RODRIGUEZ,
Petitioner,

vs.

STATE OF COLORADO,
Respondent.

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF PETITIONER

INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF)[1] is a non-profit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the constitutional protection of the accused into balance with the rights of the victim and of society to rapid, efficient, and reliable determination of guilt and swift execution of punishment.

In this case, the defendant is attempting to use his Sixth Amendment right to an impartial jury as a sword

1. Both parties have filed blanket consents to *amicus* briefs.

No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae* CJLF made a monetary contribution to its preparation or submission.

to slice open the firmly established rule that jurors may not testify as to statements made during deliberations if such testimony is used to challenge the validity of the verdict. Furthermore, reversing the conviction would force the two young victims to again testify as to the sexual assault they both endured. The use of the Sixth Amendment in this manner is contrary to the interests CJLF was formed to protect.

SUMMARY OF FACTS AND CASE

In May 2007, two teenage sisters were approached by a man in a bathroom of a horse-racing facility where Petitioner Miguel Peña-Rodriguez worked. *Peña-Rodriguez* v. *People*, 350 P. 3d 287, 288 (Colo. 2015) (en banc). While in the bathroom, the man asked the sisters if they wanted to "party." Respondent's Brief in Opposition to Petition for Writ of Certiorari ("Opp.") 3. When the sisters refused, the man turned the bathroom light off, leaving the room dark. *Ibid.* As the sisters attempted to leave the dark bathroom, the man grabbed at the girls—one on the shoulder, then the breast, the other on the shoulder, then the buttocks. *Ibid.* After a struggle, the sisters escaped and told their father, also a race track employee, what had happened in the bathroom. *Id.*, at 4. The police were notified. *Ibid.*

Later that night, the teenage sisters identified Petitioner as the man who assaulted them. Opp., at 4. Petitioner was subsequently charged with one count of attempted sexual assault on a child (felony), one count of unlawful sexual contact (misdemeanor), and two counts of harassment (misdemeanors). *Ibid.*

During *voir dire*, the venire received a written questionnaire that included several questions regarding each juror's ability to render a verdict based on the evidence presented at trial. *Peña-Rodriguez*, 350 P. 3d,

at 288. Prior to *voir dire*, defense counsel was advised by the judge that "in the past, some of our jurors have been vocal in their dislike of people who aren't in the country legally. So I don't know if that's an issue for you or your client, but you may want to address it." Opp. 4-5. Defense counsel chose not to mention race or immigration status, nor ask any questions about the venire's experiences or views on race. *Id.*, at 5. Further, none of the empaneled juror's *voir dire* responses reflected a propensity towards racial bias. *Peña-Rodriguez*, 350 P 3d, at 288.

The empaneled jury deliberated for a "somewhat lengthy" period of time. Brief for Petitioner 6. The jury reported to the judge that they were unable to reach a unanimous decision on any of the charges. *Ibid.* The judge admonished them to keep deliberating to try and reach unanimity. *Ibid.*

After deliberating for a total of 12 hours, the jury found Petitioner guilty of the three misdemeanor counts of unlawful sexual contact and harassment, but they were unable to reach a verdict on the felony charge of attempted sexual assault on a child. *Id.*, at 7.

After trial, two jurors (M.M. and L.T.) spoke with defense counsel alleging that a fellow juror (H.C.) had made racially biased statements about Petitioner and Mexican men in general during deliberations. *Peña-Rodriguez*, 350 P 3d, at 288-289. The trial court subsequently granted Petitioner's motion for juror contact information. *Ibid.* Petitioner then moved for a new trial submitting affidavits from jurors M.M. and L.T. *Id.*, at 289. According to M.M. and L.T., H.C. said "I think he did it because he's Mexican and Mexican men take whatever they want." *Ibid.* The two jurors also stated that juror H.C. "made other statements concerning Mexican men being physically controlling of women because they have a sense of entitlement and

think they can 'do whatever they want with women.' " *Ibid.* Also, H.C. "believed that [Petitioner] was guilty because in his experience as an ex-law enforcement officer, Mexican men had a bravado that caused them to believe they could do whatever they wanted with women." *Ibid.* In addition, L.T. contended that H.C. "said that where he used to patrol, nine times out of ten Mexican men were guilty of being aggressive toward women and young girls" and "he did not think the alibi witness was credible because, among other things, he was 'an illegal.' " *Ibid.*

The trial court denied the motion, finding that Colorado Rule of Evidence 606(b) barred any inquiry into juror deliberations. *Peña-Rodriguez*, 350 P 3d, at 289.

Petitioner appealed and a divided Court of Appeals affirmed. *Ibid.* The Colorado Supreme Court also affirmed, by a 4-3 vote. *Id.*, at 293.

SUMMARY OF ARGUMENT

The right to an impartial jury of one's peers is guaranteed by the Sixth Amendment. Preserving and protecting the secrecy of jury deliberations is regarded as sacrosanct. Both of these principles have deep historical roots and both are of upmost importance.

Rule 606(b) prohibits the use of post-verdict juror testimony to inquire into the validity of a verdict. Congress's broad codification of the no-impeachment rule precludes testimony of biased statements made during jury deliberations. Allegations of racial bias by a juror do not fall within any of the three enumerated exceptions and the Sixth Amendment does not create a fourth implicit exception for such allegations. Preserving the confidentiality of jury deliberations is funda-

mental to the uninhibited and forthright discussion that must occur within the jury room when deciding a peer's fate.

Tanner v. *United States* and *Warger* v. *Shauers* addressed the constitutional interplay between jury impartiality versus jury secrecy, and in both cases this Court held that jury secrecy prevails. *Tanner* held that a defendant's Sixth Amendment rights are adequately protected by several aspects of the trial process. *Tanner*'s "sources of protection" apply in this case with equal force. Allowing litigants to peek into the jury deliberation room under the guise of determining whether racial bias played a role in the decision-making process is contrary to Congressional intent and this Court's precedent. The consequences of abandoning the protections given to secret jury deliberations are too great.

ARGUMENT

I. Preserving the secrecy of jury deliberations is consistent with the right to a jury trial guaranteed by the Sixth Amendment.

The right to a trial by jury in all criminal prosecutions is guaranteed by the United States Constitution. U. S. Const., Art. III, § 2, cl. 3.[2] The Sixth Amendment, made applicable to the states by the Fourteenth Amendment, expands upon that right and guarantees to the criminally accused an impartial jury from the state and district where the crime was committed. U. S.

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2. "The trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed "

Const., Amdt. 6;[3] *Duncan* v. *Louisiana*, 391 U. S. 145, 149 (1968).

Trial by jury has deep historical roots and has significantly evolved over hundreds of years. W. Forsyth, History of Trial by Jury 1-5 (2d ed. 1971). The English colonists brought trial by jury to America and declared it an " 'inherent and invaluable right of every British subject in these colonies.' " *Duncan*, 391 U. S., at 152 (quoting resolution of the Stamp Act Congress (1765)). The colonists were vehemently against "trials before judges dependent on the crown alone for their salaries." *Ibid.*; see also *Singer* v. *United States*, 380 U. S. 24, 29 (1965) (referring to the colonists' "increasing hostility to the Crown"). "Its preservation and proper operation as a protection against arbitrary rule were among the major objectives of the revolutionary settlement which was expressed in the Declaration and Bill of Rights of 1689." *Duncan*, 391 U. S., at 151.

Trial by jury was well established by the time the Constitution and Bill of Rights were drafted and ratified. America's founding fathers included in those two documents the explicit right to a jury trial to "guard against a spirit of oppression and tyranny on the part of rulers, and against a spirit of violence and vindictiveness on the part of the people." J. Story, Commentaries on the Constitution of the United States § 924, p. 657 (abridged ed. 1833, reprinted 1987).

The methods of protecting those underlying reasons are found in the Fifth and Sixth Amendments. The

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3. The Sixth Amendment provides, in part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed[.]" U. S. Const., Amdt. 6.

Fifth Amendment guards against vindictive prosecution by requiring a grand jury to first convene and assess whether there is cause to prosecute. *Id.*, §§ 928-929, at 661-662. "They sit in *secret*, and examine the evidence laid before them *by themselves*." *Ibid.* (emphasis added). It is "long established policy" and well settled in this Court that grand juries operate in total secrecy. *United States* v. *Sells Engineering, Inc.*, 463 U. S. 418, 424-425 (1983); see also *United States* v. *Williams*, 504 U. S. 36, 48 (1992). "Both Congress and this Court have consistently stood ready to defend it against unwarranted intrusion." *Sells Engineering*, 463 U. S., at 425.

The right to an impartial jury of one's peers is guaranteed by the Sixth Amendment. Jury trials are fundamental to our criminal justice system, seeking to protect against arbitrary power and influence, and government oppression. *Duncan*, 391 U. S., at 153; *Thompson* v. *Utah*, 170 U. S. 343, 350 (1898), overruled on other grounds in *Collins* v. *Youngblood*, 497 U. S. 37, 51-52 (1990). The rule that demands secrecy of what that impartial jury discusses behind closed doors during deliberations predates the Sixth Amendment and can be traced to common law in the 1785 case of *Vaise* v. *Delaval*, 99 Eng. Rptr. 944 (K. B. 1785). In that case, the judge (Lord Mansfield), was informed that the jury had decided the case by drawing lots. *Warger* v. *Shauers*, 574 U. S. __, 135 S. Ct. 521, 526, 190 L. Ed. 2d 422, 428 (2014); see also *United States* v. *Benally*, 546 F. 3d 1230, 1233 (CA10 2008). "Mansfield's Rule" declared that the proffered juror affidavits detailing the alleged activity were inadmissible and instituted a blanket ban on jurors testifying against their own verdict. *Benally*, *supra*, at 1233. Over time, "Mansfield's Rule" found itself imbedded in this Court's constitutional jurisprudence. "By the beginning of this century, if not earlier, the near universal and firmly

established common-law rule in the United States flatly prohibited the admission of juror testimony to impeach a verdict." *Tanner* v. *United States*, 483 U. S. 107, 117 (1987).

State court decisions from the early nineteenth century reflect the acceptance of Mansfield's Rule.

> "I am opposed to penetrating into the recesses of a jury-room, through the instrumentality of jurors, who are kept together until they have agreed upon their verdict. The settled rule in New York and Virginia, as well as most modern English authorities, are adverse to the receiving of such testimony. [t]he testimony of jurors ought not be admitted to invalidate their verdicts." *Lessee of Cluggage* v. *Swan*, 4 Binn. 150, 158-159 (Pa. 1811).

> "The former practice, both in England and in this country, was to admit the testimony of jurors in regard to their own misbehaviour. But this practice was broken in upon by Lord Mansfield in *Vaise* v. *Delaval*, 1 T.R. 11, *and has ever since been holden to be improper and dangerous. The rule is now perfectly well settled in both countries and may be laid down to be, that the testimony of jurors is inadmissible to show their own misbehaviour*[.]" *Dorr* v. *Fenno*, 12 Pick. (29 Mass.) 521, 525 (1832) (emphasis added); see also *Dana* v. *Tucker*, 4 Johns. 487, 488 (1809) (*per curiam*).

Thus, Mansfield's Rule cannot be inconsistent with the right to a jury trial as embodied within the Sixth Amendment and made applicable to the states by the Fourteenth, because it was sweeping the country contemporaneously with the ratification of the Bill of Rights, and it was established law when the Fourteenth Amendment was adopted.

II. Rule 606(b) constitutionally precludes juror testimony relating to allegations of racial bias during deliberations.

Colorado Rule of Evidence 606(b)[4] and its federal counterpart Federal Rules of Evidence 606(b)[5] codify the common-law rule and bar the use of post-verdict juror testimony to inquire into the validity of a verdict. *Warger* v. *Shauers*, 574 U. S. __, 135 S. Ct. 521, 527, 190 L. Ed. 2d 422, 430 (2014). Among other reasons, jurors are prohibited from impeaching their own verdicts in order to "promot[e] the finality of verdicts and insulat[e] the jury from outside influences." *Id.*, 135 S. Ct., at 526, 190 L. Ed. 2d, at 428, citing *McDonald* v. *Pless*, 238 U. S. 264, 267-268 (1915).

As originally enacted, the only express exceptions to Rule 606(b) were for "extraneous information and outside influences." *Warger*, 135 S. Ct., at 527, 190 L. Ed. 2d, at 430. A third exception was added in 2006

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4. Colorado Rule of Evidence 606(b) provides: "Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of a jury's deliberations or to the effect of anything upon his or any other juror's mind or emotions as influencing him to assent to or dissent from the verdict or indictment or concerning his mental processes in connection therewith. But a juror may testify about (1) whether extraneous prejudicial information was improperly brought to the jurors' attention, (2) whether any outside influence was improperly brought to bear upon any juror, or (3) whether there was a mistake in entering the verdict onto the verdict form. A juror's affidavit or evidence of any statement by the juror may not be received on a matter about which the juror would be precluded from testifying."

5. Colorado recognizes that its no-impeachment rule is substantially similar to the federal rule and it looks to federal authority to guide its construction of the state rule. *Stewart ex rel. Stewart* v. *Rice*, 47 P. 3d 316, 321 (Colo. 2002).

for mistakes made when entering the verdict on the verdict form. *Id.*, 135 S. Ct., at 527, n. 2, 190 L. Ed. 2d, at 430, n. 2. "Rule 606(b) is a rule of evidence, but its role in the criminal justice process is substantive: it insulates the deliberations of the jury from subsequent second-guessing by the judiciary." *United States* v. *Benally*, 546 F 3d 1230, 1233 (CA10 2008).

In this case, two jurors offered testimony via affidavits that may show the verdict was affected by a fellow juror's racial bias. Thus,

> "[w]hen the affidavit of a juror, as to the misconduct of himself or the other members of the jury, is made the basis of a motion for a new trial, the court must choose between redressing the injury of the private litigant and inflicting the public injury which would result if jurors were permitted to testify as to what happened in the jury room." *McDonald* v. *Pless*, 238 U. S. 264, 267 (1915).

Petitioner is seeking a new trial and the only evidence he has to offer in support of his motion are the two juror affidavits that contain statements allegedly made by a fellow juror *during* deliberations. These affidavits fall squarely within the parameters of Rule 606(b). The only reason they are being considered in this appeal is because of their allegations of racial bias. Their admission is prohibited unless the Sixth Amendment requires another exception in addition to those in the text of the rule.

A. Rule 606(b) Versus the Sixth Amendment.

This Court addressed the interplay between Rule 606(b) and the Sixth Amendment in both *Tanner* and *Warger*. In *Tanner* v. *United States*, 483 U. S. 107, 113 (1987), the defendants filed a motion seeking permission to interview the jurors, an evidentiary hearing and

a new trial after they were convicted, but before they were sentenced. The motion was based on a report of a juror that several jurors consumed drugs and alcohol during the trial causing them to sleep through the afternoons. *Ibid.* The trial court concluded that any juror testimony about juror intoxication was inadmissible under Rule 606(b). *Ibid.* However, the trial court allowed a hearing with non-juror witnesses, such as court personnel, so that they could testify as to their observations of the jury. *Ibid.*

After the hearing, the trial court denied the motion for a new trial. *Id.*, at 115. While an appeal was pending, defendants filed another motion for a new trial based on additional evidence from another juror alleging more detailed evidence of juror drug and alcohol use during the trial. *Id.*, at 115-116. The motion was again denied. *Id.*, at 116. The Eleventh Circuit affirmed and the issue before this Court was whether Rule 606(b) barred juror testimony of drug and alcohol use, and whether an evidentiary hearing that included such juror testimony was compelled by their Sixth Amendment right to a competent jury. *Id.*, at 116-117.

This Court canvassed the legislative history of Rule 606(b) and concluded it "demonstrates with uncommon clarity that Congress specifically understood, considered, and rejected a version of Rule 606(b) that would have allowed jurors to testify on juror conduct during deliberations." *Id.*, at 125. This Court further held that juror intoxication is not an "outside influence" about which jurors may testify to impeach their verdict, and the proposed juror testimony was barred by Rule 606(b).

This Court then addressed whether prohibiting jurors from testifying as to their conduct during deliberations violates a defendant's right to a fair trial before an impartial and competent jury. *Id.*, at 126. The

constitutional argument was rejected due to "long-recognized and very substantial concerns support[ing] the protection of jury deliberations from intrusive inquiry." *Id.*, at 127.

It was further held that a defendant's Sixth Amendment right to a mentally competent jury is protected by several aspects of the trial process:

> "The suitability of an individual for the responsibility of jury service, of course, is examined during *voir dire*. Moreover, during the trial the jury is observable by the court, by counsel, and by court personnel. [Citation.] Moreover, jurors are observable by each other, and may report inappropriate juror behavior to the court *before* they render a verdict. [Citation.] Finally, after the trial a party may seek to impeach the verdict by nonjuror evidence of misconduct." *Ibid.* (emphasis in original).

Even though *Tanner* involved juror competency, rather than impartiality, these "sources of protection" apply in this case with equal force. Here, the judge cautioned the defense about the possibility of the jurors' "dislike of people who aren't in the country legally." Opp. 4-5. The judge advised the defense that they "may want to address the possibility of bias." *Ibid.* "[*V*]*oir dire* can be an essential means of protecting" a defendant's right to an impartial jury *Warger*, 135 S. Ct., at 528-529, 190 L. Ed. 2d, at 431.

In this case, the defense chose not to mention race or immigration status, nor ask the venire about their views on race, despite an invitation from the judge to do so. "*Voir dire* plays a critical function in assuring the criminal defendant that his Sixth Amendment right to an impartial jury will be honored." *Rosales-Lopez* v. *United States*, 451 U. S. 182, 188 (1981) (plurality opinion).

> "A trial represents an important investment of private and social resources, and it ill serves the important end of finality to wipe the slate clean simply to recreate the peremptory challenge process because counsel lacked an item of information which objectively he should have obtained from a juror on *voir dire* examination." *McDonough Power Equipment, Inc.* v. *Greenwood*, 464 U. S. 548, 555 (1984).

If counsel's choice was ineffective assistance, there is a remedy. If not, the defense should not be allowed to roll the dice and then complain about a problem it could have prevented.

In addition, jurors M.M. and L.T. could have reported juror H.C.'s racially biased comments made during deliberations *before* a verdict was reached. This is especially true considering that the jury was initially unable to reach a verdict on any of the charges. The jury informed the judge they were unable to reach a verdict. Brief for Petitioner 6. The judge then admonished the jury to continue deliberating and attempt to reach unanimity. *Ibid.*

According to Petitioner, the trial court informed the jurors that it was their duty "to consult with one another and to deliberate with a view of reaching a verdict." *Ibid.* When the judge was informed of the jury's inability to agree, any one of the jurors could have told the judge about the racial comments made by juror H.C. The judge could have investigated the allegations and made a decision as to whether juror H.C. should be excused.

"Due Process does not require a new trial every time a juror has been placed in a potentially compromising situation. Were that the rule, few trials would be constitutionally acceptable." *Smith* v. *Phillips*, 455 U. S. 209, 217 (1982). It is the responsibility of the trial

judge to be "ever watchful to prevent prejudicial occurrences and to determine the effect of such occurrences *when* they happen." *Ibid.* (emphasis added). The trial judge holds the keys, and it is within his or her control to determine if prejudice is seeping in. If the judge is informed during the trial or deliberations of juror misconduct, he or she has the option to declare a mistrial, or that juror can be dismissed and replaced with an alternate, or in some jurisdictions the parties can stipulate to a jury of less than 12. Gershman, Contaminating the Verdict: The Problem of Juror Misconduct, 50 S. D. L. Rev. 322, 339 (2005).

More recently, in *Warger* v. *Shauers*, *supra*, this Court had another opportunity to examine the constitutional concerns raised by Rule 606(b). This Court unanimously held that Rule 606(b) precludes a party from introducing juror testimony in a proceeding in which that party is seeking a new trial based on evidence that a juror lied during *voir dire*. 135 S. Ct., at 528, 190 L. Ed. 2d, at 431.

Warger is a civil case in which Petitioner Warger's motorcycle was struck from behind by Respondent Shauers' truck. *Id.*, 135 S. Ct., at 524, 190 L. Ed. 2d, at 427. Warger suffered extensive injuries and sued Shauers for negligence in Federal District Court. *Ibid.* Lengthy *voir dire* was conducted and none of the jurors responded affirmatively to the question of whether they could *not* be a fair and impartial juror on the type of case before them. *Ibid.* The trial commenced and the jury returned a verdict in favor of Shauers. *Ibid.* After the case was over, one of the jurors contacted Warger's attorney and stated that another juror commented during deliberations that her daughter had been at fault in a car accident in which a man had died. *Ibid.* The juror expanded further, allegedly saying that it

would have ruined her daughter's life if she had been sued. *Ibid.*

Warger moved for a new trial on the ground that a juror had deliberately lied during *voir dire* about her ability to be impartial. *Ibid.* The District Court denied the motion because the only evidence supporting Warger's claim were comments made during deliberations and they were barred by Rule 606(b). *Id*, 135 S. Ct., at 525, 190 L. Ed. 2d, at 427. The Eighth Circuit affirmed, and this Court granted certiorari and also affirmed. See *id.*, 135 S. Ct., at 525, 190 L. Ed. 2d, at 428.

This Court examined the historical evolution of Rule 606(b) from common law through its codification by Congress. *Id.*, 135 S. Ct., at 525-527, 190 L. Ed. 2d, at 428-430. It is important to note that early on, many courts, including this Court, interpreted Mansfield's Rule differently—some courts applied it narrowly and others applied it more broadly. *Id.*, 135 S. Ct., at 526, 190 L. Ed. 2d, at 428-429. Under the narrow approach, also known as the "Iowa Rule," juror testimony was excluded only if it "consisted of evidence of the jurors' subjective intentions and thought process in reaching a verdict." *Id.*, 135 S. Ct., at 526, 190 L. Ed. 2d, at 428. Thus, courts adhering to this narrow view allowed testimony of jury deliberations when used to challenge juror conduct during *voir dire*. *Id.*, 135 S. Ct., at 526, 190 L. Ed. 2d, at 429. In the present case, the juror was speaking of his own thought process, and the evidence would have been excludable even under the narrow view of the rule.

Under the broader approach, also known as the "federal approach," all evidence of jury deliberations was inadmissible unless used to prove an "extraneous matter" influenced the jury. *Ibid.* Courts adhering to this broader view did not allow testimony of jury

deliberations to demonstrate dishonestly during *voir dire*. *Ibid.*

In *Warger*, this Court made clear that it had rejected the Iowa approach in both *McDonald* v. *Pless*, 238 U. S. 264 (1915), and in *Clark* v. *United States*, 289 U. S. 1 (1933). See 135 S. Ct., at 527, 190 L. Ed. 2d, at 429-430. Congress's subsequent enactment of Rule 606(b) encompassed this Court's broader view of the no-impeachment rule. *Id.*, 135 S. Ct., at 527, 190 L. Ed. 2d, at 430.

> "For those who consider legislative history relevant, here it confirms that this choice of language was no accident. Congress rejected a prior version of the Rule that, in accordance with the Iowa approach, would have prohibited juror testimony only as to the 'effect of anything upon [any] juror's mind or emotions or concerning his mental processes' [Citation.] Thus Congress 'specifically understood, considered, and rejected a version of Rule 606(b)' that would have likely permitted the introduction of evidence of deliberations to show dishonesty during *voir dire*." *Ibid.*; see also *Benally*, 546 F. 3d, at 1238-1239.

Warger holds that Congress's broad codification of the no-impeachment rule precludes biased statements made during jury deliberations to prove a juror lied during *voir dire*. If those biased statements cannot be introduced to prove a juror lied during *voir dire*, thus precluding any questioning about a juror's impartiality when rendering a verdict, it follows that a juror's biased statements made during deliberations also cannot be introduced in a motion for a new trial unless the statement falls into express exception to the Rule.

B. Sufficiency of Tanner Safeguards.

Rule 606(b) has three enumerated exceptions: (1) whether extraneous prejudicial information was improperly brought to the jurors' attention (*i.e.*, newspaper article or television newscast), (2) whether any outside influence was improperly brought to bear upon a juror (*i.e.*, attempted bribe or threat to juror's safety), or (3) whether there was a mistake in entering the verdict onto the verdict form. Racially biased comments do not fall into the scope of any of these three exceptions. See *Benally*, 546 F. 3d, at 1237-1238. Nor did Congress create a fourth exception for alleged racially biased statements or comments made during deliberations. Creating an implicit exception for alleged racially biased statements is the type of subjective second-guessing by the judiciary that this Court sought to avoid and would contravene explicit Congressional intent. *Id.*, at 1239.

> "[A] court in a particular case is not the proper forum for making or enlarging exceptions to the rules of evidence. Our commission is to apply the Rules of Evidence as written and interpreted to the case at hand. Perhaps it would be a good idea to amend Rule 606(b) to allow testimony revealing racial bias in jury deliberations, but the body entrusted with making the Rules is Congress[.]" *Id.*, at 1238.

It is important to note that in *Warger*, this Court stated in a footnote that "[t]here may be cases of juror bias so extreme that, almost by definition, the jury trial right has been abridged. If and when such a case arises, the Court can consider whether the usual safeguards are or are not sufficient to protect the integrity of the process. We need not consider the question, however, for those facts are not presented here." *Id.*, 135 S. Ct., at 529, n. 3, 190 L. Ed. 2d, at 432, n. 3. A juror's bias

may be actual or implied as a matter of law. *United States* v. *Wood*, 299 U. S. 123, 133 (1936).

This is not a case of extreme juror bias that justifies a need to revisit the *Tanner* safeguards. An extreme case might be, for example, a jury deliberation infected with racial hatred so deep that the jury would convict without evidence or on clearly insufficient evidence. Juror H.C.'s stereotypical beliefs do not rise to that level. The only evidence presented by the defense in this case are affidavits from two jurors that allege racially biased comments were made by one other juror during deliberations. There is no evidence to show that the racially biased comments persuaded all 12 jurors to vote guilty. There is no evidence to show that the two complaining jurors were strong-armed into voting guilty by juror H.C.'s racially biased statements. There is no evidence to prove that juror H.C. is a racist, or that he based his guilty vote solely on racial prejudices and not on the evidence presented. Furthermore, the guilty verdicts on all three misdemeanor counts were unanimous, which means jurors M.M. and L.T. concurred in the decision to find Petitioner guilty beyond a reasonable doubt. See *Benally*, 546 F 3d, at 1241.

The *Tanner* safeguards apply in cases like this one and equally seek to protect a defendant's right to an impartial jury.

> "Voir dire can still uncover racial predilections, especially when backed up by the threat of contempt or perjury prosecutions. Jurors can report to the judge during trial if racist remarks intrude on jury deliberations, enabling the judge to declare a mistrial or take other corrective measures. After the verdict is rendered, it could still be impeached if there is evidence of juror wrongdoing that does not depend on the testimony of fellow jurors in breach of Rule 606(b) confidentiality. And even trial

observation could uncover racist attitudes if a juror openly wore his feelings on his sleeve. These protections might not be sufficient to eliminate every partial juror, just as in *Tanner* they proved insufficient to catch every intoxicated juror, but jury perfection is an untenable goal." *Id.*, at 1240.

C. Court of Appeals Cases.

The issue of introducing racially biased comments made during deliberations has been at issue in several Federal Court of Appeals cases. The First and Seventh Circuits agree that juror testimony concerning alleged racially biased statements is deemed incompetent under Rule 606(b) and stressed the importance of the policies embodied within the Rule. See *United States* v. *Villar*, 586 F 3d 76, 83-84 (CA1 2009); see also *Shillcutt* v. *Gagnon*, 827 F. 2d 1155, 1158-1159 (CA7 1987). Despite that acknowledgment, the Seventh Circuit nonetheless declared that the Rule could not be applied where racial prejudice "pervaded the jury room" and thus affected the outcome of the verdict. *Shillcutt*, 827 F 2d, at 1159. The First Circuit found a constitutional exception for "rare and grave cases" that "implicate a defendant's rights to due process and an impartial jury." *Villar*, 586 F. 3d, at 87. Both Circuit Courts went beyond the intended dictates of the Rule and essentially created their own exception to Rule 606(b) for allegations of racial bias during deliberations.

In *United States* v. *Henley*, 238 F. 3d 1111, 1121 (CA9 2001), a Ninth Circuit case decided before *Warger*, one of the issues was whether Rule 606(b) precludes the admission of racially biased statements made by a juror outside the deliberation room when offered to show a juror lied during *voir dire*. The court held that the Rule does not preclude its admission. *Ibid.*, citing *Hard* v. *Burlington Northern R.R.*, 812 F. 2d 482 (CA9 1987).

Because *Henley* was decided prior to *Warger* and reached an opposite result on similar facts, it has little or no authority as precedent. Even though it was not at issue, the court further stated in dicta that "a powerful case can be made that Rule 606(b) is wholly inapplicable to racial bias" because racial bias is "plainly a mental bias" unrelated to the issues that a jury may legitimately be called upon to determine in a criminal case. *Henley*, 238 F. 3d, at 1120.

The Third Circuit also addressed whether racially biased statements allegedly made by jurors during deliberations could be introduced to challenge a juror's honesty during *voir dire* in a state-prisoner habeas corpus case, *Williams* v. *Price*, 343 F. 3d 223 (CA3 2003) (Alito, J.). The Third Circuit refused to follow the Ninth Circuit's lead, stating its precedent appears to be "inconsistent with" Rule 606(b). *Id.*, at 236, n. 5. Rather, the court found that "*Tanner* implies that the Constitution does not require the admission of evidence that falls within Rule 606(b)'s prohibition." *Id.*, at 235. Applying the federal habeas corpus standard for claims rejected on the merits by the state courts, the court held that no Supreme Court decision "clearly establishes that it is unconstitutional for a state to apply a 'no impeachment' rule that does not contain an exception for juror testimony about racial bias on the part of jurors." *Id.*, at 239.

Perhaps the most instructive Court of Appeals case on this issue, and the best articulated analysis as to why Rule 606(b) constitutionally precludes juror testimony of racial bias, is the Tenth Circuit's decision in *Benally*. The facts are somewhat analogous to this case. Mr. Benally, a member of the Ute Mountain Ute Tribe, was charged with and found guilty of assault. 546 F. 3d, at 1231. During *voir dire*, the venire was asked several questions about their views on Native Americans. *Ibid.*

No jurors responded in a manner that would indicate potential bias. *Ibid.*

The day after the jury announced its verdict, one juror approached defense counsel and claimed that the jury deliberation had been improperly influenced by biased claims about Native Americans. *Ibid.* Armed with two affidavits of alleged racial bias by jurors, Benally moved to vacate the verdict and receive a new trial on the basis that the jurors lied during *voir dire* about their racial bias towards Native Americans. *Id.*, at 1232. The Tenth Circuit held that Rule 606(b) prohibits juror testimony of racial bias in jury deliberations and there is no Sixth Amendment exception. *Id.*, at 1231.

The *Benally* court discussed the history and purpose of Rule 606(b) and the policies it seeks to protect—namely, the finality of verdicts, protection against juror harassment, it reduces the incentive for jury tampering, it promotes free and frank discussion, and it protects the community's trust in the jury system. *Id.*, at 1234.

With those policy reasons in mind, the court examined the Ninth and Third Circuits' assessment of the issue. The court rejected the Ninth Circuit's interpretation, which permitted juror testimony to show deceit during *voir dire*, even when the improper *voir dire* was the basis for a new trial. *Id.*, at 1235-1236. Instead it followed the Third Circuit's approach and held that "allowing juror testimony through the backdoor of a voir dire challenge risks swallowing the rule." *Id.*, at 1236.

The *Benally* court then refused to create an implicit exception to the Rule for evidence of racial bias stating that "courts no longer have common law authority to fashion and refashion rules of evidence as the justice of

the case seems to demand, but must enforce the rules as enacted." *Id.*, at 1239.

Lastly, the *Benally* court addressed the argument that Rule 606(b) was unconstitutional as applied to the defendant. *Id.*, at 1239-1241. The court discussed *Tanner* at length and held that the standards enunciated in that case protects a defendant's Sixth Amendment right without "breaching the ban on post-verdict juror testimony " *Id.*, at 1240.

> "It may well be true that racial prejudice is an especially odious, and especially common, form of Sixth Amendment violation. But once it is held that the rules of evidence must be subordinated to the need to admit evidence of Sixth Amendment violations, we do not see how the courts could stop at the 'most serious' such violations.
>
> Nor does there seem to be a principled reason to limit the exception only to claims of bias, when other types of jury misconduct undermine a fair trial as well. If a jury does not follow the jury instructions, or ignores relevant evidence, or flips a coin, or falls asleep, then surely that defendant's right to a fair trial would be aggrieved " *Id.*, at 1241.

The broad codification of Mansfield's Rule enacted by Congress and copied by Colorado precludes jurors from testifying about anything discussed during deliberations unless it falls into an express exception to Rule 606(b). The facts of this case do not. Congress did not enact a fourth exception for allegations of racial bias, and it would be improper for this Court to create an exception that is in direct contravention of express legislative intent. If this Court opens the door to allow allegations of racial bias during deliberations, where would the exception end? It would permit endless future litigation over other types of discriminatory bias,

such as gender, religion, age, disability, and sexual orientation to name a few. "[I]f every claim that, if factually supported, would be sufficient to demand a new trial warrants an exception to Rule 606(b), there would be nothing left of the Rule, and the great benefit of protecting jury decision-making from judicial review would be lost." *Ibid.*

III. Preserving the confidentiality of jury deliberations is fundamental to the uninhibited and forthright discussion that must occur for a jury to wholly focus on reaching the right result.

Protecting the sanctity and secrecy of private jury deliberations is not a new precept. "Freedom of debate might be stifled and independence of thought checked if jurors were made to feel that their arguments and ballots were to be freely published to the world." *Clark* v. *United States*, 289 U. S. 1, 13 (1933). Furthermore, it is a violation of federal law for anyone who is not empaneled as a juror to knowingly or willingly record, attempt to record, listen to or observe, or attempt to listen to or observe, grand or petit jury proceedings. See 18 U. S. C. § 1508.

Jurors can be unpredictable and at times haphazard. A carefully selected group of 12 men and women step into the jury box with very little in common. Once they retire to the jury room to deliberate, that group of 12 now have the duty to come together as a harmonious whole with justice as their goal. They are the epitome of democracy in action. American jurors come from all walks of life—from the highly educated to the illiterate, wealthy to middle class to barely scraping by, copious note-takers who intently listen to every word spoken to

those day-dreaming throughout the proceedings about their upcoming vacation.

Jury members reflect different opinions, different backgrounds, different biases, different religions, different races, different political affiliations, and different educational backgrounds. The American jury system works well because of these differences. Jurors may use their own common sense and real world experience to decide if one version of the events is more plausible than the other and must be freely able to explain to their fellow jurors why a witness was or was not credible. They must also be able to give their opinions without constraint about the character of the involved parties.

The jury room is a place for open discussion and debate. Private jury deliberations allow a jury to focus on reaching the right result. If jurors knew their deliberations were to be made public or inquired into, their focus may switch from the right result to the result that may be the most amenable to public opinion. "[F]ull and frank discussion in the jury room, jurors' willingness to return an unpopular verdict, and the community's trust in a system that relies on the decisions of laypeople would all be undermined by a barrage of post-verdict scrutiny of juror conduct." *Tanner* v. *United States*, 483 U. S. 107, 120-121 (1987). Furthermore,

> "[o]ne prominent commentator has concluded that '[g]enerally, it seems better to draw [the line] in favor of juror privacy; in the heat of juror debate all kinds of statements may be made which have little effect on outcome, though taken out of context they seem damning and absurd.' " *Smith* v. *Brewer*, 444 F. Supp. 482, 490 (SD Iowa 1978) (quoting 3 J. Weinstein & M. Berger, Weinstein's Evidence 606-636 (1976)).

The jury system is admittedly far from perfect. A criminal defendant is entitled to a fair trial, not a perfect one. *Delaware* v. *Van Arsdall*, 475 U. S. 673, 681 (1986).

> "There is little doubt that postverdict investigation into juror misconduct would in some instances lead to the invalidation of verdicts reached after irresponsible or improper juror behavior. It is not at all clear, however, that the jury system could survive such efforts to perfect it. Allegations of juror misconduct, incompetency, or inattentiveness, raised for the first time days, weeks, or months after the verdict, seriously disrupt the finality of the process." *Tanner*, 483 U. S., at 120.

The founders of our country strongly desired to give criminal defendants the right to a jury of their peers. Because of this right, ordinary citizens have a duty to participate in court proceedings to decide the fate of fellow citizens faced with criminal charges. It is unlikely that all 12 jurors will all agree on every point at the outset of deliberations. There may be a couple of jurors who view the facts and evidence differently from their fellow jurors. The jurors must be able to candidly discuss these differences of opinion. A jury of ordinary citizens cannot be expected to do the right thing if they fear their discussions will become the centerpiece of a post-verdict attack.

A. Privileged Communications in Other Areas of the Law.

The policies that underlie several areas of privileged communication are analogous to the policies that prohibit jurors from testifying against their own verdicts. Both seek to promote uninhibited and forthright discussion of which secrecy and confidentiality are fundamental.

> "The privileges between priest and penitent, attorney and client, and physician and patient limit protection to private communications. These privileges are rooted in the imperative need for confidence and trust. The priest-penitent privilege recognizes the human need to disclose to a spiritual counselor, in total and absolute confidence, what are believed to be flawed acts or thoughts and to receive priestly consolation and guidance in return. The lawyer-client privilege rests on the need for the advocate and counselor to know all that relates to the client's reasons for seeking representation if the professional mission is to be carried out. Similarly, the physician must know all that a patient can articulate in order to identify and to treat disease; barriers to full disclosure would impair diagnosis and treatment." *Trammel* v. *United States*, 445 U. S. 40, 51 (1980).

Deeply rooted in common law is the marital communication privilege. This privilege excludes as evidence the private communications between husband and wife made in the confidence of the marital relationship. *Ibid.* "The basis of the immunity given to communications between husband and wife is the protection of marital confidences, regarded as so essential to the preservation of the marriage relationship as to outweigh the disadvantages to the administration of justice which the privilege entails." *Wolfle* v. *United States*, 291 U. S. 7, 14 (1934); see also *Stein* v. *Bowman*, 38 U. S. 209, 223 (1839) ("To break down or impair the great principles which protect the sanctities of husband and wife, would be to destroy the best solace of human existence").

Another analogous area in which this Court has recognized the need for a very broad privilege is the immunity given to members of Congress pursuant to

the Speech or Debate Clause of Article I, section 6, clause 1.[6]

> "The reason for the privilege is clear. It was well summarized by James Wilson, an influential member of the Committee of Detail which was responsible for the provision in the Federal Constitution. 'In order to enable and encourage a representative of the public to discharge his public trust with firmness and success, it is indispensably necessary, that he should enjoy the fullest liberty of speech, and that he should be protected from the resentment of every one, however powerful, to whom the exercise of that liberty may occasion offence.'" *Tenney* v. *Brandhove*, 341 U. S. 367, 373 (1951) (quoting 2 Works of James Wilson 38 (Andrews ed. 1896)).

The Speech or Debate Clause affords members of Congress absolute immunity from lawsuit, an absolute testimonial privilege, and an absolute evidentiary privilege. See *Eastland* v. *United States Servicemen's Fund*, 421 U. S. 491, 501-503 (1979); see also *Dombrowski* v. *Eastland*, 387 U. S. 82, 85 (1967) (*per curiam*). "Since the Glorious Revolution in Britain, and throughout United States history, the privilege has been recognized as an important protection of the independence and integrity of the legislature." *United States* v. *Johnson*, 383 U. S. 169, 178 (1966). The Clause assures wide freedom of speech, debate, and deliberation to the legislative branch without intimidation from the executive and judicial branches. *Gravel*

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6. "The Senators and Representatives . . shall in all cases, except treason, felony and breach of the peace, be privileged from arrest during their attendance at the session of their respective Houses, and in going to and returning from the same; and for any speech or debate in either House, they shall not be questioned in any other place." U. S. Const., Art. I, § 6, cl. 1.

v. *United States*, 408 U. S. 606, 616 (1972); see also *United States* v. *Helstoski*, 442 U. S. 477, 492 (1979).

Even though legislative acts are not done in private, nor are they intended to be secret, the policy behind the privilege is to allow members of Congress to debate freely and openly without fear of repercussion. In the jury deliberation context, juries should similarly be able to freely and openly deliberate without fear of their comments and opinions being scrutinized in public, or being subject to second-guessing or overruling by a judge.

When legislators are working in their legislative capacity, and jurors are working in their juror capacity, both should be able to discuss their thoughts, opinions, and ideas without restraint. Both are entitled to protection from questioning about the statements they made or actions taken while carrying out their duties. "[J]ury deliberations seem to conform perfectly with the utilitarian conception of privileged communications: they arise from a relationship of trust, and their confidentiality is preserved[.]" Note, Public Disclosures of Jury Deliberations, 96 Harv. L. Rev. 886, 900, n. 84 (1983).

The priest-penitent, attorney-client, physician-patient, husband-wife, and Congressional privileges are all entrenched in common law. Secret jury deliberations are also rooted in common law. These privileges serve similar purposes and are intended to encourage candid, direct, and unrestrained discussion. All of these rules of law sacrifice the completeness of evidence to serve an interest in confidentiality that society deems more important. Making these judgments is within the competence of the authorities vested with the power to make the rules of evidence.

B. Total Elimination of Bias Untenable.

Justitia, the Roman Goddess of Justice, also known as Lady Justice, sits in many courthouses and law schools around the world. Her presence is empowering—she stands tall, blindfolded, holding the scales of justice. Her blindfold represents "blind justice." Justice is to be meted out impartially and objectively without fear and regardless of wealth, status, race, gender, or identity.

Bias, of any kind, should never motivate a juror to convict or acquit a criminal defendant. Racial bias is deplorable and our judicial system has made great strides over the years in an attempt to eliminate racial bias in the jury selection process and during jury deliberations. See, *e.g.*, *Strauder* v. *West Virginia*, 100 U. S. 303, 310 (1880) (exclusion of blacks from juries by reason of their race violated Equal Protection Clause); *Batson* v. *Kentucky*, 476 U. S. 79 (1986) (peremptory challenge may not be used to exclude juror solely based on race); see also *Turner* v. *Murray*, 476 U. S. 28, 36-37 (1986) (capital defendant accused of an interracial crime entitled to have prospective jurors informed of victim's race and questioned on the issue of racial bias.) However, "[t]he difficulty springs from the fact that all adults have beliefs, values, and prejudices which make impartiality in the *tabula rasa* sense impossible." Gobert, In Search of the Impartial Jury, 79 J. Crim. L. & C. 269, 271 (1988).

"Impartiality is not a technical conception. It is a state of mind. For the ascertainment of this mental indifference, the Constitution lays down no particular tests and procedure is not chained to any ancient and artificial formula." *United States* v. *Wood*, 299 U. S. 123, 145-146 (1936). Jurors need not be totally ignorant of the facts and issues involved, but must have the ability to set aside their opinions or impressions and

render a verdict based on the evidence developed at trial. *Irvin* v. *Dowd*, 366 U. S. 717, 722-723 (1961); *Turner* v. *Louisiana*, 379 U. S. 466, 472-473 (1965).

This Court is no stranger to the fact that racial prejudice may go undetected in jury deliberations, especially in capital sentencing proceedings. See *Turner* v. *Murray*, 476 U. S., at 35 (plurality opinion) ("[f]ear of blacks, which could easily be stirred up by the violent facts of petitioner's crime, might incline a juror to favor the death penalty"). " 'It remains an unfortunate fact in our society that violent crimes perpetrated against members of other racial or ethnic groups often raise [a reasonable possibility that racial prejudice would influence the jury].' " *Id.*, at 35, n. 7 (quoting *Rosales-Lopez* v. *United States*, 451 U. S. 182, 192 (1981)). Upon being empaneled, jurors are instructed to leave their preconceived prejudices and opinions at home. In an ideal world, they are to walk into the jury box with an open mind and the wherewithal to listen to the evidence and facts presented. However, in all reality, it is unknown if that actually happens because "[j]uries provide no reasons, only verdicts." *Benally*, 546 F. 3d, at 1233.

The American jury decision-making process has been described as a "black box." *Ibid.* "[T]he inputs (evidence and argument) are carefully regulated by law and the output (the verdict) is publically announced, but the inner workings and deliberation of the jury are deliberately insulated from subsequent review." *Ibid.* If this Court were to delve into the inner workings of jury deliberations to determine if racial bias played a role in the verdict, the exception may end up swallowing the rule that has been firmly established for hundreds of years. The "black box" theory of jury decision making will cease to exist because this Court opened up Pandora's Box. Allowing jurors to impeach their own

verdict with testimony about alleged racial bias during deliberations may appear to create a small peek into the black box. However, over time that small peek will slowly open up even further with allegations of different types of alleged bias and eventually the black box will be blown wide open.

Trial by jury reflects the values and standards of the general public brought together for the sole purpose of deciding a peer's fate. If this Court allows litigants to peek into the jury deliberation room under the guise of determining whether bias played a role in the decision-making process, a juror's ability to be impartial may be quashed out of fear of public scrutiny. A jury's "black box" decision-making process and its independence from subjective overrule by the judiciary must be fiercely guarded. The consequences of abandoning the protections given to secret jury deliberations are too great.

CONCLUSION

The judgment of the Colorado Supreme Court should be affirmed.

September, 2016

Respectfully submitted,

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IN THE

Supreme Court of the United States

MIGUEL ANGEL PEÑA RODRIGUEZ,
Petitioner,

v.

STATE OF COLORADO,
Respondent.

On Writ of Certiorari to the
Colorado Supreme Court

BRIEF FOR *AMICI CURIAE* THE HISPANIC NATIONAL BAR ASSOCIATION, LATINOJUSTICE PRLDEF, AND THE ANTI-DEFAMATION LEAGUE IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*[1]

The membership of *amicus curiae* the Hispanic National Bar Association (the "HNBA") comprises thousands of Latino lawyers, law professors, law students, legal professionals, state and federal judges, legislators, and bar affiliates across the country. The HNBA supports Hispanic legal professionals and is committed to advocacy on issues of importance to the 53 million people of Hispanic heritage living in the United States. The HNBA regularly petitions Congress and the Executive on behalf of all members of the communities it represents.

Amicus curiae LATINOJUSTICE PRLDEF ("LJP") is a national not-for-profit civil rights legal defense fund that has advocated for and defended the constitutional rights and the equal protection of all Latinos under the law. Since its founding in 1972 as the Puerto Rican Legal Defense & Education Fund, LJP's continuing mission is to promote the civic participation of the greater pan-Latino community in the United States, to cultivate new Latino community leaders, and to engage in and support law reform cases around the country addressing basic civil rights in the areas of criminal justice, education, employment, fair housing, immigrants'

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[1] All parties to this litigation have consented to this *amici curiae* brief, and letters of consent have been filed with the Clerk. No counsel for a party authored this brief in whole or in part, and no person or entity other than *amici* and their counsel made a monetary contribution to the preparation or submission of this brief.

rights, language rights, redistricting and voting rights. LJP seeks to ensure that Latinos are not illegally or unfairly affected by discriminatory policies and practices, particularly by government actors.

Amicus curiae the Anti-Defamation League ("ADL") was founded in 1913 to combat anti-Semitism and all forms of bigotry, to defend democratic ideals, and to secure justice and fair treatment to all. ADL is vitally interested in protecting the civil rights of all persons and ensuring that each individual receives equal treatment under the law regardless of race, sex, sexual orientation, gender identity, ethnicity, or religion. Consistent with its mission, ADL is committed to working to eliminate racial bias in the criminal justice system.

SUMMARY OF ARGUMENT

Direct evidence in this case suggests that Petitioner Miguel Angel Peña Rodriguez may have been convicted by a jury not on the basis of the evidence presented at trial, but rather on the basis of at least one juror's racial prejudice. If true, allowing Peña Rodriguez's conviction to stand would be among the most grievous errors a State can inflict on an individual, as few rights are more central to our system of ordered liberty than everyone's right to a "fair trial in a fair tribunal." *Irvin v. Dowd*, 366 U.S. 717, 722 (1961).

But a Colorado rule of evidence—shared by many other states—bars Peña Rodriguez from even attempting to make the case that his conviction was

structurally flawed due to racial bias. The Colorado Supreme Court's holding that this state rule of evidence trumps constitutional rights to a fair trial, free of racial bias, is constitutionally intolerable.

While this Court should hold that, under any standard, the state rule of evidence must yield to Petitioner's constitutional rights, the best analytical framework for addressing the question presented is the familiar strict-scrutiny standard that would normally apply to other claims of purposeful discrimination on the basis of race. That framework is the focus of this brief.

Strict scrutiny of Rule 606(b) is warranted in light of the uniquely pernicious role of racial discrimination in the criminal justice system. That requirement flows directly from the surpassing importance of ensuring the system is free of racial bias. Indeed, this Court has already recognized that "*all* of the circumstances that bear upon the issue of racial animosity must be consulted." *Snyder v. Louisiana*, 552 U.S. 472, 478 (2008) (emphasis added). And this Court's cases addressing how to resolve collisions between state evidentiary rules and constitutional rights of criminal defendants—such as the right to present a fair defense or the right to confront to witnesses offering testimonial statements—have also subjected the state rules to searching review, or even presumed as self-evident that such conflicting evidentiary rules must be invalid. The most searching level of constitutional scrutiny therefore should apply to the sort of state evidentiary rule at issue in this case. Under that demanding standard, Colorado Rule 606(b) must

yield to Peña Rodriguez's fundamental constitutional rights.

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Finally, this case is an ideal vehicle to announce such a rule. After all, Petitioner's plausible direct evidence of juror racial prejudice against Mexicans in particular and Latinos more broadly exemplifies the harmful consequences of the systemic underrepresentation of Hispanic people on American juries. Nationwide, the lack of Latino representation in jury pools and on juries exacerbates the risk that juries might use race—rather than the evidence presented—as the determining factor in depriving a Hispanic defendant of his liberty.

ARGUMENT

I. THIS COURT SHOULD APPLY STRICT SCRUTINY TO INVALIDATE THE APPLICATION OF RULE 606(b) IN THIS CASE.

A. Eliminating racial prejudice from the criminal justice system is a constitutional imperative of the highest order that reflects the unique role of race in the Nation's history.

Our Constitutional system provides criminal defendants with a number of important rights. But the right to a criminal proceeding free of racial discrimination is unique among them. That is because racial bias against a defendant not only affects the individual defendant, but more broadly "mars the integrity of the judicial system and prevents the idea of democratic government from

becoming a reality." *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 628 (1991). For this reason, the Court has engaged in "unceasing efforts to eradicate racial prejudice from our criminal justice system." *McCleskey v. Kemp*, 481 U.S. 279, 309 (1987).

The Court's efforts to enforce the mandate of equal administration of justice have spanned the entire spectrum of criminal proceedings—and they have focused in particular on the critical role of the jury in the criminal justice system. *Strauder v. West Virginia*, 100 U.S. 303 (1880), for instance, held that the Equal Protection Clause is violated when African-Americans are purposefully excluded from juries on account of their race. *Id.* at 310. Over seventy years later, the Court expanded that protection to other groups—overturning the conviction of a Mexican-American man who was tried in a jurisdiction that had, for decades, excluded all Latinos from jury service. *Hernandez v. Texas*, 347 U.S. 475, 482 (1954); *see also Whitus v. Georgia*, 385 U.S. 545, 551 (1967) (reversing conviction because of purposeful discrimination in jury selection). The selection of a grand jury, too, must be free from racial bias. *Rose v. Mitchell*, 443 U.S. 545, 556 (1979). And the Court's landmark decision in *Batson v. Kentucky*, 476 U.S. 79 (1986) extended that logic to prohibit prosecutors from using peremptory strikes to eliminate jurors on the basis of their race. Thus, as the Court recently noted, the "Constitution forbids striking even a single prospective juror for a discriminatory purpose." *Foster v. Chatman*, 136 S. Ct. 1737, 1747 (2016) (quotation marks omitted).

This unyielding effort to eradicate racial bias as a factor in the composition of, and decisionmaking by, a jury is an outgrowth of the central role that juries play in a criminal trial. The jury is not a mere collection of private citizens tasked with assisting judges in determining guilt or innocence. To the contrary: "The jury exercises the power of the court and of the government that confers the court's jurisdiction." *Edmonson*, 500 U.S. at 624. With that great power comes the requirement that a jury must afford a defendant a "fair trial in a fair tribunal," *Irvin*, 366 U.S. at 722, and so must determine guilt or innocence without regard to the race of the defendant—or the prosecutor, attorneys, judges, or victims, for that matter. Instead, a defendant is entitled to "a jury capable and willing to decide the case solely on the evidence before it." *McDonough Power Equip., Inc. v. Greenwood*, 464 U.S. 548, 554 (1984) (quotation marks omitted).

B. State justifications for evidentiary rules that categorically prohibit the introduction of direct evidence of racially discriminatory juror statements must be subjected to strict scrutiny.

While the process of selecting and instructing the petit jury is subject to many safeguards to protect against the pernicious effects of racial discrimination, jury deliberations themselves are not monitored by the court or the parties. That is because the jury is an independent decisionmaker. But when direct, reliable evidence suggests that even a single juror made a decision to convict based

on a discriminatory purpose, any evidentiary rule that would prohibit introduction of that evidence, like Colorado's Rule 606(b) or its federal equivalent, must be subjected to strict scrutiny.

This searching standard of review is required because this Court has "treated as presumptively invidious those classifications that disadvantage a 'suspect class,' or that impinge upon the exercise of a 'fundamental right.'" *Plyler v. Doe*, 457 U.S. 202, 216-17 (1982) (footnotes omitted). It is well established that the right to an impartial jury, free of racial bias, is a fundamental right of the highest importance. *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968); *see also Hernandez*, 347 U.S. at 482 (reversing conviction of defendant where Latinos were systematically excluded from jury pool). To impose anything less than the most searching scrutiny on a rule of evidence that categorically bars a defendant from showing that he was, in fact, convicted by a jury that used his race as a determining factor would present an unacceptably high a risk that his right to an impartial jury would be rendered "nugatory and meaningless." *Morgan v. Illinois*, 504 U.S. 719, 733-34 (1992).

In particular, the reasoning of the *Batson* line of cases demands the application of strict scrutiny here. After all, "in considering a *Batson* objection, or in reviewing a ruling claimed to be *Batson* error, *all* of the circumstances that bear upon the issue of racial animosity must be consulted." *Snyder*, 552 U.S. at 478 (emphasis added). Applying that principle, this Court recently considered evidence of the use of race in jury selection found in the

prosecution's file. "Despite questions about the background of [those] particular notes," the Court emphatically rejected "the State's invitation to blind [itself] to their existence." *Foster*, 136 S. Ct. at 1748. So too here: evidentiary rules that would force a court to "blind [itself]" to the existence of evidence of juror bias must be strictly scrutinized—at a minimum, where the claim is based on discrimination on the basis of race.

Two other complementary lines of cases support the application of strict scrutiny here: cases balancing courtroom rules against the rights of defendants, and cases governing racial classifications by the government. In the first line of cases, rules of evidence that have impinged on important rights of defendants have frequently been subjected to a careful and searching examination (albeit without the Court's expressly framing the inquiry as an application of "strict scrutiny"). In *Chambers v. Mississippi*, 410 U.S. 284 (1973), for instance, where state rules of evidence stood as an obstacle to the introduction of evidence that someone other than the defendant had committed the crime, the Court "closely examined" the relevant evidentiary rules because they conflicted with the defendant's right to put on a fair defense and have a fair trial. *Id.* at 295. Under that searching standard, the Court found that the evidentiary rules must give way, because their "mechanistic[]" application had "denied [the defendant] a trial in accord with traditional and fundamental standards of due process." *Id.* at 302; *see also Rock v. Arkansas*, 483 U.S. 44, 45 (1987) (applying a state evidentiary rule prohibiting the admission of

hypnotically refreshed testimony would violate petitioner's constitutional right to testify).

The Court likewise has held that state procedural rules that would permit the introduction of certain types of "testimonial" evidence are presumptively unconstitutional, because the introduction of that evidence would infringe the defendant's Sixth Amendment rights. Thus, in *Crawford v. Washington*, 541 U.S. 36, 68 (2004), this Court overruled its prior balancing test and held that a defendant's Sixth Amendment right to confront his accuser trumped a state rule of evidence that permitted the introduction of an out-of-court statement by the defendant's wife. *See also Bullcoming v. New Mexico*, 564 U.S. 647, 665 (2011) (Sixth Amendment required exclusion of forensic evidence permitted by state rule of evidence). Indeed, in *Crawford* and later cases applying that principle, it was unnecessary for the Court to articulate a level of scrutiny because state rules of evidence are presumptively unconstitutional to the extent they are applied to preclude the exercise of a defendant's right to confront witnesses offering "testimonial" evidence. Apparently, *no* justification for the state's evidentiary rules, no matter how persuasive, can overcome a defendant's right to confront witnesses making these statements.

Separately, cases in which a defendant alleges invidious discrimination on the basis of race are subject to strict scrutiny because that rule applies to "all racial classifications imposed by government." *Johnson v. California*, 543 U.S. 499, 505 (2005) (quotation marks and brackets omitted). In these

cases, strict scrutiny is a tool courts use to "smoke out illegitimate uses of race," *id.* at 506—illegitimate uses like a juror's conviction of a criminal defendant simply because he is Mexican.

The convergence of these two doctrines—the first related to evidentiary rules that directly conflict with certain constitutional rights, the second related to the presumptively unconstitutional nature of express racial classifications—supports the application of strict scrutiny to rules of evidence, like Colorado Rule 606(b), that prohibit the introduction of direct evidence that a defendant's fundamental right to be free from a racially-discriminatory jury has been infringed. After all, "[d]etermining whether invidious discriminatory purpose was a motivating factor [in a governmental decision] demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977). If state evidentiary rules are allowed to stand as an obstacle to such "sensitive inquir[ies]," *id.*, "the opportunity to prove actual bias," which is "a guarantee of a defendant's right to an impartial jury," could become little more than an empty formality. *See Dennis v. United States*, 339 U.S. 162, 171-72 (1950).

Under *amici*'s proposed framework, strict scrutiny would be triggered only when a defendant has obtained *direct and individualized evidence* tending to show that a juror voted to convict on the basis of the defendant's race. That evidentiary requirement distinguishes this case from others in which the Court has shown reluctance to allow

claims of bias based on statistical or indirect evidence to overcome neutral procedural rules. For instance, in *United States v. Armstrong*, 517 U.S. 456 (1996), the Court concluded that the defendants' bare allegation of selective and racially motivated prosecutions within the jurisdiction did not entitle them to prosecutorial materials whose disclosure was not otherwise authorized by Federal Rule of Criminal Procedure 16. *Id.* at 463. The sole basis for the defendants' allegation of bias in *Armstrong* was a study purporting to show general disparities in drug prosecutions according to race. The Court applied similar logic in *McCleskey* when it rejected a discrimination claim grounded on a study highlighting differential rates at which the death penalty is imposed, again depending on the defendant's race. 481 U.S. at 292. As in *Armstrong*, the fatal flaw in *McCleskey* was the defendant's failure to establish individualized evidence of racial bias: "[T]o prevail under the Equal Protection Clause," the Court explained, the defendant "must prove that the decisionmakers in *his* case acted with discriminatory purpose." 481 U.S. 279, 292 (1987) (emphasis in original).

By contrast, the claim here is fundamentally different from the kind of claim that *McCleskey* or *Armstrong* rejected. Rather, it is the very kind of claim that each of those cases implied *would* entitle defendants to make out a plausible case: one supported by direct, individualized evidence of invidious racial discrimination in jury decisionmaking. Any state or federal rule of evidence that prevents a defendant from pursuing such a claim therefore must be subjected to the most

careful scrutiny. If the rules preventing this inquiry were given anything less than this scrutiny, jurors whose prejudices slip through the cracks at jury selection could be permitted to render "nugatory and meaningless," *Morgan*, 504 U.S. at 733-34, the bedrock right to an impartial trial.

C. Rule 606(b) cannot survive strict scrutiny as applied here.

Under the familiar "strict scrutiny" standard, the government has the burden to prove that the challenged regulation is a "narrowly tailored measure[] that further[s] compelling governmental interests." *Johnson*, 543 U.S. at 505 (quotation marks omitted). Applying that standard here, Rule 606(b) must yield to Petitioner's constitutional rights, thereby allowing Petitioner to introduce direct evidence of purposeful racial discrimination.

First, Rule 606(b) and its federal and state counterparts are not narrowly tailored. Like the federal equivalent, Colorado Rule 606(b) is an avowedly sweeping provision that prevents introduction of virtually all evidence of jury deliberations, as it contains only three "narrow exceptions" to its blanket coverage—none of which covers juror racial bias. Pet. App. 7a. As this Court has already recognized, Rule 606(b)'s coverage is so broad that it would exclude evidence even in "cases of juror bias so extreme that, almost by definition, the jury trial right has been abridged." *Warger v. Shauers*, 135 S. Ct. 521, 529 n.3 (2014). A rule of evidence that sweeps this broadly is not narrowly tailored.

Second, the interests the Rule furthers are not compelling—especially when weighed against the critical constitutional right to be free from conviction based on purposeful juror discrimination. This Court has recognized two purposes behind the federal analogue to Colorado's evidentiary rule (Federal Rule 606(b)): the interest in ensuring finality in litigation, and the notion that "'fairness requires that absolute privacy be preserved for jurors to engage in the full and free debate necessary to the attainment of just verdicts.'" *Tanner v. United States*, 483 U.S. 107, 124 (1987) (quoting S. Rep. No. 93-1277, 13-14 (1974)). While those interests are valid as a general matter, they are obviously inapt where a verdict has been tainted by invidious racial prejudice. The government has *no* interest in the finality of a verdict reached in violation of a defendant's right to a fair trial, nor is there any legitimate interest in allowing jurors to have a "free debate" when that debate violates a defendant's constitutional right to a fair trial. *See Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 95 (1972) ("[I]n all equal protection cases . . . the crucial question is whether there is an *appropriate* governmental interest suitably furthered by the differential treatment.") (emphasis added).

Thus, trying to find any valid governmental interest here is as fruitless as trying to find an interest in applying a neutral procedural rule to require the admission of testimonial evidence in violation of a defendant's rights under the Sixth Amendment's Confrontation Clause. This Court has determined that the Sixth Amendment's protections are not to be left to the "vagaries of the rules of

evidence," no matter what the purpose of those rules might be. *Crawford*, 541 at 61. The Constitution trumps *whatever* vague justifications the state might offer. Similarly here, where a defendant has direct and individualized evidence that he or she was convicted on the basis of a juror's purposeful racial discrimination, the government has no valid interest in finality or secrecy that can overcome the strong interest in allowing the evidence to be admitted.

II. THE ACUTE PROBLEM OF UNDERREPRESENTATION OF THE LATINO COMMUNITY ON JURIES UNDERSCORES THE NEED FOR STRICT SCRUTINY.

Despite this Court's continuing efforts to prevent racial bias from infecting the criminal justice system, the unfortunate fact remains that many minority groups continue to be underrepresented on jury venires and, ultimately, on petit juries. Research shows this problem is particularly acute with respect to Latinos and other native Spanish speakers. Indeed, it was not so long ago that counties systematically excluded people with "Mexican or Latin-American surnames" from jury pools—a practice this Court definitively prohibited in *Hernandez v. Texas*, which was the first case to apply equal protection principles to people of Hispanic heritage. 347 U.S. at 480. Although jurisdictions may no longer openly discriminate on that basis, the reality of continued underrepresentation further justifies the application of the strictest of scrutiny to the state evidentiary rule in this case.

Surveys of the jury pools in New York, for instance, present a troubling picture. In Manhattan, a survey of over 14,000 prospective jurors found that, while people of color as a whole tended to be underrepresented, Hispanics were underrepresented by a stunning 77%. In other words, Hispanics comprised only 6.3% of the jurors assembling for new cases even though Hispanics were 27.2% of the population. Bob Cohen and Janet Rosales, *Racial and Ethnic Disparity in Manhattan Jury Pools: Results of a Survey and Suggestions for Reform* (June 2007).[2] Likewise, a survey of jurors in New York state found that Hispanics were underrepresented on juries in 58 of New York's 62 counties—and were at par with census demographics in the remaining four—indicating that the problem of underrepresentation persists in urban, rural, and suburban areas. *See* Ann Pfau, *First Annual Report Pursuant to Section 528 of the Judiciary Law* (Report of the Chief Administrative Judge of the State of New York, 2011) at Table C.[3]

This concern is by no means confined to the State or City of New York. In Harris County, Texas—Houston's home county—a newspaper investigation revealed that "there are three times more adult Hispanics living in Harris County than the [relative] number who serve on grand juries." Matt Dempsey and Karen Chen, "Hispanic Representation on

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[2] *See* http://www.law.cuny.edu/academics/social-justice/clore/reports/Citizen-Action-Jury-Pool-Study.pdf.

[3] *See* http://www.courts.state.ny.us/publications/pdfs/528_ReportNov2011.pdf

Harris County Grand Juries Far Below Population," *Houston Chronicle* (Dec. 19, 2014).[4] As the investigation noted, this underrepresentation is so drastic that it may well be unconstitutional on its own under *Castaneda v. Partida*, 430 U.S. 482, 501 (1977), which had reversed the conviction of a Texas man that resulted from an indictment by a grand jury composed of a similarly disproportionate number of Mexican-Americans to the results shown today.

Litigation in Colorado and elsewhere continues to reveal the depth of the problem. In 2008, the Colorado Supreme Court found that a "defect" in the "jury-selection process" in Arapahoe County—the same county in which Petitioner was tried in this case—caused "statistically significant underrepresentation" of Hispanics, as well as African-Americans, on the county's jury panels. *Washington v. People*, 186 P.3d 594, 601 (Colo. 2008). The court thus directed that one particular jury-selection practice that likely led to the disparity "be stopped immediately." *Id.* at 606.

Structural defects like these in the jury-selection process highlight why state evidentiary rules should not be allowed to require courts to blind themselves to probative evidence of actual racial bias that taints a conviction. This is confirmed by expert evidence submitted in a recent criminal case in Washington. That evidence revealed that Latinos made up 17.3%

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[4] *See* http://www.houstonchronicle.com/news/houston-texas/houston/article/Hispanic-representation-on-Harris-County-grand-5969524.php.

of the relevant qualified jury population, but only 10.5% of the jury pool. Br. for Appellant at *26 in *United States v. Burgess*, 9th Cir. No. 15-30261 (decision pending), *available at* 2016 WL 1003314; *see also Serena v. Mock*, 547 F.3d 1051, 1054 (9th Cir. 2008) (noting that the "statistical evidence that Hispanics have been underrepresented [on grand juries in a California county] by an absolute disparity of 13.5% over the past three years is troubling," but dismissing appeal on procedural grounds). Regardless of whether these disparities themselves trigger a constitutional violation, it remains the case that the number of available Hispanic jurors is not completely representative of their presence in the overall population.

The problem of demographic underrepresentation in jury pools is compounded by a language divide. Hispanic people who are called to jury duty often face a linguistic gauntlet on two fronts when it comes to actually serving on the petit jury: some may be excluded from service because they do not speak English, while others may be excluded precisely because they are bilingual, at least in cases where there could be testimony in Spanish translated into English. *See Hernandez v. New York*, 500 U.S. 352 (1991) (holding that using peremptory strikes to eliminate jurors who spoke Spanish did not violate the Equal Protection Clause). This problem means that even when Hispanics are summoned for jury service, they are unlikely to be chosen for service unless they speak English and *only* English. Perversely, this problem is most likely to occur where the defendant is also Hispanic.

Whatever the cause of the deep underrepresentation of Hispanic jurors, it has a clear effect: it makes it unlikely that the twelve people assigned to judge a defendant's guilt or innocence will contain any Hispanic people. That is particularly troubling given the empirical evidence that the absence of a member of a particular racial group on a jury makes it more likely that a juror will feel free to express racial bias without fear that it will elicit disapproval or protest from other jurors. "[S]ocial scientists have long understood that the presence of minority group jurors may inhibit majority group members from expressing prejudice, especially if the defendant is from the same group as the minority group jurors." Jessica West, *12 Racist Men: Post-Verdict Evidence of Juror Bias*, Harvard J. on Racial & Ethnic Justice 195 (Spring 2011) (discussing, among other studies, Samuel R. Sommers, *On Racial Diversity and Group Decision Making: Identifying Multiple Effects of Racial Composition on Jury Deliberations*, 90 J. Personality & Soc. Psych. 597, 606 (2006)).

Having more Hispanic jurors thus might temper the instincts of those jurors who would be inclined to convict on the basis of race and not the evidence. But since, for now, the problem of underrepresentation is particularly acute, the Court must allow defendants to attempt to remedy any violations of their fair-trial and equal-protection rights that plausibly have occurred in the jury room. Invalidating the application of rules of evidence under a strict-scrutiny framework in circumstances like these is the best way to do that.

CONCLUSION

For the foregoing reasons, this Court should reverse the decision of the Colorado Supreme Court.

Respectfully submitted,

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IN THE
Supreme Court of the United States

MIGUEL ANGEL PEÑA-RODRIGUEZ,
Petitioner,

v.

STATE OF COLORADO,
Respondent.

On Writ of Certiorari to the Supreme Court of the State of Colorado

BRIEF OF INDIANA, ALABAMA, ARKANSAS, GEORGIA, IDAHO, LOUISIANA, MAINE, NEVADA, PENNSYLVANIA, SOUTH DAKOTA, TEXAS, AND WYOMING AS *AMICI CURIAE* IN SUPPORT OF THE RESPONDENT

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QUESTION PRESENTED

Does the Sixth Amendment compel an exception to the no-impeachment rule to address allegations that racially biased statements were made during jury deliberations?

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OTHER AUTHORITIES [CONT'D]

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6 Wayne R. LaFave et al., *Criminal Procedure* (4th ed. 2015) 20, 21

INTEREST OF THE *AMICI* STATES

The States of Indiana, Alabama, Arkansas, Georgia, Idaho, Louisiana, Maine, Nevada, Pennsylvania, South Dakota, Texas, and Wyoming respectfully submit this brief as *amici curiae* in support of Respondent, the State of Colorado. Forty-two states have a rule or statute generally prohibiting the use of juror testimony regarding statements made during jury deliberations when that testimony is offered to challenge the validity of the verdict. *See* Appendix. Eight states have similar judge-made rules. *Id.* A handful of states have applied state-law racial-bias exceptions to their no-impeachment rules. *Id.*; *see also* Part I, *infra*.

Petitioner seeks to require *all* states to afford a racial-bias exception to the no-impeachment rule as a matter of constitutional right. Doing so, however, would expose jury verdicts to intrusive investigation and judicial second-guessing. To be clear, no one thinks that a system that facilitates criminal convictions based on racial bias or other prejudices is tolerable. The question is whether the Sixth Amendment guarantees a trial scrubbed of any taint of bias at all costs, or whether it permits state and federal judicial systems to respect jury secrecy and finality while providing other safeguards against biased verdicts. The *amici* States have a longstanding, fundamental interest in ensuring the integrity and finality of jury verdicts while providing tools other than juror impeachment to fight prejudice in the jury room.

SUMMARY OF THE ARGUMENT

No-impeachment rules safeguard deliberative secrecy—an essential feature of the jury system. Public confidence in the jury system is undermined where courts have the ability to pry into the "black box" and second-guess jury verdicts. As this Court explained a century ago, once verdicts "can be attacked and set aside on the testimony of those who took part in their publication . . . all verdicts could be, and many would be, followed by an inquiry in the hope of discovering something which might invalidate the finding." *McDonald v. Pless*, 238 U.S. 264, 267 (1915). When no verdict is truly final, jurors will be "harassed and beset by the defeated party" in an effort to find evidence of misconduct, and such evidence will be used "to make what was intended to be a private deliberation, the constant subject of public investigation; to the destruction of all frankness and freedom of discussion and conference." *Id.* at 267–68.

Accordingly, the secrecy of the deliberative process is widely regarded as the cornerstone of the American jury system. And, since the earliest days of the Republic, the no-impeachment rule has been a critical tool for ensuring the secrecy of jury deliberations. Every state judicial system, not to mention the federal system, has come to depend on some variation of it. And when the Advisory Committee on the Federal Rules of Evidence proposed softening the no-impeachment rule, the Department of Justice, this Court, and Congress ultimately rejected the proposal.

While not without its costs, the no-impeachment rule has proven over time to be the best method of "promoting the finality of verdicts and insulating the jury from outside influences[.]" *Warger v. Shauers*, 135 S. Ct. 521, 526 (2014). Adhering to it sometimes yields facially unsavory verdicts, but the alternative would be a greater evil still: a system of largely provisional jury decisions, followed by judicial inquiry into the "fairness" of jury deliberations. In such a system, the benefits of relying on juries independently to sift and weigh conflicting evidence and arrive at a collective judgment would be fatally compromised.

Nor do jury finality and the no-impeachment rule operate to the benefit of public prosecutors only. Rather, private parties are protected by the no-impeachment rule when they litigate (even against the government) in civil cases, and in criminal cases a separate protection—the Double Jeopardy Clause—safeguards jury finality. In both situations jury verdicts are final, regardless of juror statements concerning misconduct, and the government is equally bound by them.

Other constitutional and rule-based protections shield parties from juror bias, and it remains the better course to rely on those mechanisms rather than pay the very steep price of undercutting the no-impeachment rule and jury finality. The typical requirements for juror unanimity and for large juries composed of a fair cross-section of the community where the crime was committed all work to neutralize potential biases against a defendant. In

addition, voir dire, peremptory challenges and *Batson* objections all contribute to a system that seeks to sanitize juries of bias as much as possible. Particularly with these safeguards in place, relying on jurors to expose, address, and resolve explicit bias during deliberations, rather than post-verdict, properly balances the competing values of fundamental fairness and finality.

Maintaining that balance is particularly critical considering the potentially far-reaching consequences of a constitutional right to impeach an allegedly unfair verdict using juror testimony. For if that evidentiary right exists in racial-bias cases, presumably it would also exist to support *any* Sixth Amendment claim for new trial. Otherwise the Court would be in the position of elevating some new trial demands over others for purposes of the no-impeachment rule.

ARGUMENT

I. Jury Secrecy, a Critical Feature of American Jurisprudence, Has Long Been Preserved by Robust No-Impeachment Rules

As Professor Wigmore wrote over 85 years ago, "[t]he jury, and the secrecy of the jury room, are the indispensable elements in popular justice." John H. Wigmore, *A Program for the Trial of Jury Trial*, 12 J. Am. Jud. Soc'y 166, 170 (1929). When juries are subject to post-verdict scrutiny and judicial second-guessing, their role as arbiter of justice is seriously undermined. Writing for the Tenth Circuit, Judge

Michael McConnell explained that "[i]f what went on in the jury room were judicially reviewable for reasonableness or fairness, trials would no longer truly be by jury, as the Constitution commands." *United States v. Benally*, 546 F.3d 1230, 1233 (10th Cir. 2008). Rather, as Judge Charles Clark wrote for the Fifth Circuit decades ago, the result of such judicial review "would be that every jury verdict would either become the court's verdict or would be permitted to stand only by the court's leave." *United States v. D'Angelo*, 598 F.2d 1002, 1005 (5th Cir. 1979).

Accordingly, the no-impeachment rule has been foundational for the American jury system.

1. The no-impeachment rule originated in English common law with the 1785 opinion of Lord Mansfield in *Vaise v. Delaval*, 1 T.R. 11, 99 Eng. Rep. 944 (K.B. 1785). Starting from the principle that a "witness shall not be heard to allege his own turpitude," Lord Mansfield held inadmissible an affidavit from two jurors claiming that the jury had come to its decision by way of a coin toss. John L. Rosshirt, *Evidence—Assembly of Jurors' Affidavits to Impeach Jury Verdict*, 31 Notre Dame L. Rev. 484, 484 (1956). Lord Mansfield explained that his decision might be different if the information came from an external source, such as a person who glimpsed the coin toss through an open window. *Id.* But where the allegation of juror misconduct came from the jurors themselves, the court could not accept testimony impeaching their own character. *Id.*

Lord Mansfield's no-impeachment rule was widely adopted by American jurists, though they generally rejected his rationale. *See, e.g.*, *Smith v. Cheetham*, 3 Cai. R. 57, 59 (N.Y. Sup. Ct. 1805) ("If a man will voluntarily charge himself with a misdemeanor, why should he not be indulged?"). Instead, as this Court explained in *McDonald v. Pless*, adoption of the no-impeachment rule as a matter of American common law was based on policy considerations such as (1) ensuring the finality of "verdicts solemnly made and publicly returned," (2) preventing jurors from being "harassed and beset by the defeated party in an effort to secure from them evidence of facts which might establish misconduct sufficient to set aside a verdict," and (3) encouraging "frankness and freedom of discussion and conference" among jurors. 238 U.S. 264, 267–68 (1915); *see also Clark v. United States*, 289 U.S. 1, 13 (1933) ("Freedom of debate might be stifled and independence of thought checked if jurors were made to feel that their arguments and ballots were to be freely published to the world.").

By the beginning of the twentieth century, the no-impeachment rule was a "near-universal and firmly established common-law rule" throughout the United States. *Tanner v. United States*, 483 U.S. 107, 117 (1987).

2. Today, 42 states have codified the general rule and 8 others recognize it as a matter of common law. *See* Appendix. *Cf.* 8 J. Wigmore, *Evidence* § 2352, pp. 696–97 (J. McNaughton rev. ed. 1961) (stating that Lord Mansfield's rule "came to receive in the

United States an adherence almost unquestioned"). An Appendix to this brief provides citations to rules, statutes, or cases establishing the no-impeachment rule in each state.

Some states do have exceptions to their no-impeachment rules for evidence of racial bias. But Petitioner and his supporting *amici* overstate the number. *See* Pet'r Br. at 30 (claiming that "over twenty jurisdictions" provide an exception); Amicus Curiae Br. of Center on the Administration of Criminal Law [hereafter, "CACL Br."] at 3 (stating that "some 20 jurisdictions" provide an exception). As confirmed by the citations collected in the Appendix, only twelve state courts of last resort have expressly recognized and applied a state-law exception to the no-impeachment rule for evidence of racial bias.

The discrepancies arise because Petitioner (1) includes states with racial-bias exceptions predicated on the Sixth Amendment (rather than state law); (2) includes states based on inferences from broadly stated precedents and rules rather than direct application of a racial-bias exception in an actual case; and (3) includes states where the issue has been decided by an intermediate appellate court but not a state court of last resort.

First, as the whole issue here is whether the Sixth Amendment requires a racial-bias exception, it is pointless to count states whose courts have merely concluded that it does. What matters is the extent to which states have freely chosen to break with the

traditional no-impeachment rule and apply a racial-bias exception as a matter of state law. Accordingly, it is inappropriate to include the District of Columbia, Georgia, and South Carolina as states that have, of their own volition, created exceptions to the no-impeachment rule for racial bias claims. *See Kittle v. United States*, 65 A.3d 1144, 1151–56 (D.C. 2013) (citing only federal constitutional provisions and expressly observing that statements about racial bias are within the ambit of the no-impeachment rule itself); *Spencer v. State*, 398 S.E.2d 179, 184 (Ga. 1990) (relying on federal constitutional precedents to apply a racial-bias exception to the no-impeachment rule); *State v. Hunter*, 463 S.E.2d 314, 316 (S.C. 1995) (citing *McDonald*, 238 U.S. at 269, for the proposition that the federal constitution requires a racial-bias exception).

Second, a few cases cited by Petitioner—from California, Kansas, Oklahoma, and Wisconsin—did not actually apply a racial-bias exception. For California, Petitioner cites *Grobeson v. City of Los Angeles*, 118 Cal. Rptr. 3d 798, 806 (Ct. App. 2010), but that case did not address statements of racial bias. Pet'r Br. at 31 n.7. Indeed, the CACL amicus brief properly does not include California as a state with an exception for racial bias. *See* CACL Br. at App. A & B. For Kansas, Petitioner cites no cases—only that state's version of Rule 606(b), which, while not as broad as the federal rule, includes no express exception for statements concerning racial bias. *See* Kan. Stat. Ann. §§ 60-441, -444; Pet'r Br. at 31 n.7 (admitting Kansas "has yet to address the specific issue of racial bias in deliberations"). For Oklahoma,

Petitioner cites *Fields v. Saunders*, 278 P.3d 577 (Okla. 2012), but there the court stressed that "this is . not a case of a juror impeaching a verdict." *Id.* at 581; Pet'r Br. at 31 n.8. Finally, for Wisconsin, Petitioner cites *State v. Shillcutt*, 350 N.W.2d 686 (Wis. 1984), but there the court merely agreed that "'there might be instances in which testimony of [a] juror could not be excluded without 'violating the plainest principles of justice.'" *Id.* at 695 (quoting *McDonald*, 238 U.S. at 269); Pet'r Br. at 32 n.9.

Finally, regarding New York, Petitioner cites only intermediate appellate decisions, *People v. Rukaj*, 506 N.Y.S.2d 677 (App. Div. 1986), *People v. Whitmore*, 257 N.Y.S.2d 787 (Sup. Ct. 1965), and no express provision from a rule or case from the New York Court of Appeals. Pet'r Br. at 31, 37. Accordingly, it is not accurate to say that New York has definitively settled on a racial-bias exception to the no-impeachment rule as a matter of state law.

With these eight states properly accounted for, it becomes clear that only twelve states have, as a matter of state law, definitively created and applied a racial-bias exception to the no-impeachment rule. *See* Appendix.

3. In 1975, the federal government adopted its own no-impeachment rule, Federal Rule of Evidence 606(b). Rule 606(b) allows juror testimony only to show that extraneous prejudicial information or an outside influence affected jury deliberations or to show that there was a mistake in entering the verdict onto the verdict form. Fed. R. Evid. 606(b).

An earlier draft of the rule drew criticism from both legislators and Department of Justice officials, as it would have allowed use of a wider range of juror testimony to impeach verdicts. *Tanner*, 483 U.S. at 122. That earlier draft tracked the "Iowa rule," which allowed all juror testimony except that concerning matters "inher[ing] in the verdict," *Wright v. Ill. & Miss. Tel. Co.*, 20 Iowa 195, 210 (1866), *i.e.*, "evidence of the jurors' subjective intentions and thought processes in reaching a verdict." *Warger v. Shauers*, 135 S. Ct. 521, 526 (2014) (explaining the Iowa rule). In a letter to the Advisory Committee on the Federal Rules of Evidence, the Department of Justice objected to using the Iowa rule as a model, writing "[s]trong policy considerations continue to support the rule that jurors should not be permitted to testify about what occurred during the course of their deliberations." *Tanner*, 483 U.S. at 122 (citation omitted).

The Advisory Committee changed the rule to its present form, which this Court adopted and transmitted to Congress for approval. *Id.* The House Judiciary Committee, however, preferred the Iowa rule and passed an amended version more closely resembling the Advisory Committee's original proposal. *Id.* at 122–23. The Senate Judiciary Committee rejected the House version because it was concerned that it "would permit the harassment of former jurors by losing parties as well as the possible exploitation of disgruntled or otherwise badly-motivated ex-jurors." *Id.* at 124 (citation omitted). Furthermore, noted the Senate's report,

"[p]ermitting an individual to attack a jury verdict based upon the jury's internal deliberations has long been recognized as unwise by the Supreme Court." *Id.* Ultimately, in conference committee, the Senate's view prevailed and Congress rejected the Iowa rule. *Id.* at 125.

Thus, the Federal Rules Advisory Committee, the Department of Justice, this Court, and Congress *all* considered and rejected a version of the no-impeachment rule that might have allowed the type of evidence Petitioner asks the Court to permit here, *i.e.*, testimony regarding statements made in the jury room. *Cf. Shillcutt v. Gagnon*, 827 F.2d 1155, 1158 (7th Cir. 1987) ("[A]s adopted, [Federal] Rule 606(b) reflects a deliberate choice to exclude post-verdict juror testimony, with only few exceptions."). Notably, even Iowa has now rejected the "Iowa rule," as it adopted a rule substantively identical to Federal Rule 606(b) in 1983. Iowa R. Evid. 606(b). The Iowa Supreme Court has held that it, like its federal counterpart, excludes testimony regarding "each of the components of deliberation including juror arguments, statements, discussions, mental and emotional reactions, votes, and any other feature of the process occurring in the jury room." *Ryan v. Arneson*, 422 N.W.2d 491, 495 (Iowa 1988).

The Court has recognized that while some states have "made admissible a 'juror's affidavit as to an overt act of misconduct, . ' the argument in favor of that approach (*i.e.*, the Iowa rule) ha[s] not been generally accepted, because permitting such evidence 'would open the door to the most pernicious

acts and tampering with jurors.'" *Warger*, 135 S. Ct. at 527 (quoting *McDonald*, 238 U.S. at 268). That is, "[j]urors would be harassed and beset by the defeated party in an effort to secure from them evidence of facts which might establish misconduct sufficient to set aside a verdict." *McDonald*, 238 U.S. at 267. Understandably, the federal judicial system and most state judicial systems have rejected this approach.

* * *

The exception to Colorado's no-impeachment rule that Petitioner seeks is at odds with the history and traditions of jury secrecy in this country. From the time of the founding, no-impeachment rules have maintained the veil of secrecy surrounding how and why juries reach their decisions. Allowing testimony as to what jurors said during deliberations and how those statements may have influenced others will only serve to undermine the ability of the jury to weigh the evidence and arrive at difficult decisions. "[F]ull and frank discussion in the jury room, jurors' willingness to return an unpopular verdict, and the community's trust in a system that relies on the decisions of laypeople would all be undermined by a barrage of postverdict scrutiny of juror conduct." *Tanner*, 483 U.S. at 120–21.

II. The Finality of Jury Verdicts Is Critical to the Jury System and Benefits Government and Private Parties Alike

While historically and philosophically fundamental, the no-impeachment rule sometimes shields verdicts where juror misconduct offends traditional notions of fairness and justice. *See United States v. Leung*, 796 F.3d 1032, 1036 (9th Cir. 2015) (observing the rule "prevents courts from considering some conduct that does not reflect the solemn duty undertaken by jurors"). Yet this Court and others have long recognized that protecting the deliberative process justifies the rule's costs.

A. The public interest in the integrity of the jury system outweighs the rare instance of injury to the private litigant

Application of the no-impeachment rule has sometimes produced results that are difficult for private litigants to abide. In *Tanner*, for example, the Court refused to allow juror testimony alleging that several jurors had used drugs and alcohol during lunch breaks and slept through portions of the trial. 483 U.S. at 115. In *United States v. Benally*, the Tenth Circuit affirmed the conviction of a Native American man despite juror affidavits alleging that several jurors made derogatory remarks about Native Americans during the course of deliberations. 546 F.3d 1230, 1231–32 (10th Cir. 2008) (describing juror statements such as "[w]hen Indians get alcohol, they all get drunk," "when they get drunk, they get violent," and "[we need to] send a

message back to the reservation" (internal quotations omitted)). And in *United States v. Campbell*, the D.C. Circuit refused to inquire into the jury's deliberative process notwithstanding evidence that the jury arrived at unanimity only because jurors were "very unhappy about being sequestered and they were voting so that they could go home to their husbands and wives and families." 684 F.2d 141, 150–51, 150 n.18 (D.C. Cir. 1982) (internal quotations omitted).

This Court acknowledged in *McDonald* that the arguments in favor of admitting this type of juror evidence are "not only very strong, but unanswerable . when looked at solely from the standpoint of the private party who has been wronged by such misconduct." *McDonald*, 238 U.S. at 268. The court system is inevitably forced to choose between the "lesser of two evils," as it "must choose between redressing the injury of the private litigant and inflicting the public injury which would result if jurors were permitted to testify as to what had happened in the jury room." *Id.* at 267.

The Court has consistently favored "the weighty government interest in insulating the jury's deliberative process." *Tanner*, 483 U.S. at 120. And as Judge McConnell explained for the Tenth Circuit in *Benally*, "[w]here the attempt to cure defects in the jury process—here, the possibility that racial bias played a role in the jury's deliberations—entails the sacrifice of structural features in the justice system that have important systemic benefits, it is not necessarily in the interest of overall justice to do

so." *Benally*, 546 F.3d at 1240; *see also Leung*, 796 F.3d at 1036 ("The notion that egregious juror conduct will not necessarily result in relief from the verdict may seem antithetical to our system of due process," but "[t]he [no-impeachment] Rule exists for good reason."); *Carson v. Polley*, 689 F.2d 562, 581 (5th Cir. 1982) ("While jurors may reach a verdict because of secret beliefs that have little to do with the law or the facts," inquiry into such matters "would destroy the effectiveness of the jury process which substantial justice demands and the constitution guarantees." (internal quotation marks and citation omitted)); *United States v. Snipes*, 751 F. Supp. 2d 1279, 1282–83 (M.D. Fla. 2010) (stating that possible juror misconduct in that case "presents a troubling set of circumstances, but further pursuit of the issue is clearly foreclosed by Federal Rule of Evidence 606(b)," which "serves paramount interests that go to the core of our justice system").

In short, while the no-impeachment rule is not without costs, this Court has rightly concluded that, overall, jury finality is worth protecting.

B. Safeguarding the finality of jury verdicts benefits all types of parties, not merely public prosecutors

Petitioner portrays the no-impeachment rule as a shield exclusively within the government's use, *see, e.g.*, Pet'r Br. 38. But the government, too, must respect the finality of adverse verdicts. Whether due to application of the no-impeachment rule in civil cases or the Double Jeopardy Clause in criminal

cases, the government must live with unfavorable verdicts, even when those verdicts are based on considerations other than the evidence.

1. Courts have applied the no-impeachment rule to affirm civil judgments against governmental entities that sought to impeach adverse jury verdicts. In *Reifschneider v. City & County of Denver*, the trial court granted Denver's motion to dismiss a $250,000 verdict for the plaintiff based on the court's conclusion that "the jury was confused when it rendered its final verdict." 917 P.2d 315, 317 (Colo. Ct. App. 1995). The Colorado Court of Appeals reversed, holding that speculation about the jury's reasoning was exactly the type of evidence forbidden to impeach a verdict under Colorado Evidence Rule 606(b). *Id.* at 318. It noted that "the trial court's speculation as to continuing confusion intruded on the jurors' mental processes." *Id.*

Similarly, in *Mesecher v. County of San Diego*, the court affirmed a judgment against the County of San Diego, despite evidence that the jury misapplied the definition of battery. 9 Cal. App. 4th 1677, 1682–83 (1992). After the verdict, the County asked each juror to describe the deliberations and used what it learned as grounds for a new trial motion. *Id.* The motion was properly denied because "evidence about a jury's 'subjective *collective* mental process purporting to show *how* the verdict was reached' is inadmissible to impeach a jury verdict." *Id.* at 1682–84 (emphasis in original) (quoting *Ford v. Bennacka*, 226 Cal. App. 3d 330, 336 (1990)).

Similar concerns arose in *Sailor, Inc. v. City of Rockland*, 428 F.3d 348 (1st Cir. 2005). The city filed a motion for remittitur, arguing the evidence did not support an excessively high damages award. *Id.* at 351. Citing Rule 606(b), the trial court declined to investigate whether the jury had "*reasoned* properly." *Id.* at 354 (emphasis in original). The First Circuit affirmed. *Id.* at 354–55.

It is not the case, therefore, that states support the no-impeachment rule because it always protects verdicts favorable to the government. Rather, it protects the finality of *all* jury verdicts, which benefits the system as a whole, even when the government is on the losing end.

2. The finality of jury verdicts also benefits acquitted criminal defendants. In this context, it is the Double Jeopardy Clause that protects finality, but that provision serves interests similar to those underlying the no-impeachment rule. As this Court has explained, "there is no exception permitting retrial once the defendant has been acquitted, no matter how 'egregiously erroneous'" the acquittal might be. *Sanabria v. United States*, 437 U.S. 54, 75 (1978) (quoting *Fong Foo v. United States*, 369 U.S. 141, 143 (1962)). Thus, the rule of finality applies in cases in which jurors were biased against the government, its witnesses, or the victim of a crime.

Even where a juror admits to making a clerical error on the verdict form, the government must respect the acquittal, mistaken though it may be. In *Ex parte Lamb*, the jury foreman admitted, after the

jury had been discharged, that he made a mistake in signing the verdict form "not guilty" under one of the counts. 113 So. 3d 686, 688 (Ala. 2011). The Alabama Supreme Court held that the trial court could not fix this clerical mistake. *Id.* at 691. Although the foreman's error was clear from the record, "[a]ny subsequent alteration of the verdict under the facts of this case would subject Lamb to being placed twice in jeopardy for a crime he had been acquitted of[.]" *Id.*

In other cases, allowing the government to reopen a verdict to correct a jury's improper considerations would (1) "allow the prosecutor to seek to persuade a second trier of fact of the defendant's guilt after having failed with the first;" (2) "permit him to re-examine the weaknesses in his first presentation in order to strengthen the second;" and (3) "disserve the defendant's legitimate interest in the finality of a verdict of acquittal." *United States v. Wilson*, 420 U.S. 332, 352 (1975).

Ensuring a mistake-free, or even bias-free, verdict in every case is implausible and, therefore, cannot be the ultimate aim. *See United States v. Farmer*, 717 F.3d 559, 564 (7th Cir. 2013) ("It's a rare jury trial in which there are no mistakes on anyone's part."). Instead, the justice system must balance a variety of other public policy interests, some of which may justify preserving what appears to be an unfair result in a particular case. *See, e.g.*, *Arizona v. Washington*, 434 U.S. 497, 503 (1978) ("The public interest in the finality of criminal judgments is so strong that an acquitted defendant

may not be retried even though 'the acquittal was based upon an egregiously erroneous foundation.'" (quoting *Fong Foo*, 369 U.S. at 143)). As a result, the government is forced to recognize that courts protect jury acquittals "no matter how erroneous [the] decision." *Burks v. United States*, 437 U.S. 1, 16 (1978); *see also United States v. Scott*, 437 U.S. 82, 91 (1978) ("[T]he law attaches particular significance to an acquittal.").

Accordingly, while the source of the rule may be different, criminal prosecutors and defendants are both precluded from seeking new trials based on juror testimony about the role of racial (or other) bias during deliberations.

III. The Jury Process Is Capable of Detecting and Addressing Racial Bias Without an Exception to the No-Impeachment Rule

So long as juries are composed of human beings, individual biases will be impossible to exclude from jury deliberations. The exception Petitioner seeks would do nothing to safeguard jury verdicts from the influence of subconscious, unexpressed biases that jurors may hold. And to the extent Petitioner's rule might provide relief in some cases where jurors report explicit bias, it would do so at the risk of driving such bias underground in other cases, making it impossible for other jurors to confront and challenge a biased juror's prejudices. Given these realities, states with no-impeachment rules permissibly trust the deliberative process to expose and address bias, rather than unrealistically seek to

perfect deliberations by undoing verdicts based on juror testimony.

1. As the Court's decisions in *Tanner* and *Warger* recognize, existing trial procedures are more than adequate to the task of detecting bias. In those cases, the Court described several aspects of the trial process that protect a defendant's right to an impartial jury:

- Potential jurors' biases can be detected and tested during voir dire.

- During the trial, jury conduct is observable by the court, court staff, and counsel.

- Jurors can observe each other and report inappropriate behavior to the court before entry of the verdict.

- After a verdict, a party may use non-juror evidence of misconduct to impeach the verdict.

Tanner, 483 U.S. at 127; *Warger*, 135 S. Ct. at 529; *see also* Resp. Br. at 22–42 (describing each of these protections in detail).

Other structural protections also provide safeguards against bias, whether express or subconscious. The federal government and the vast majority of the states guarantee felony defendants the right to a jury of twelve, which is double the Sixth Amendment's minimum. 6 Wayne R. LaFave,

Criminal Procedure § 22.1(d), p. 22 (4th ed. 2015). Larger juries "foster effective group deliberation" and "counterbalanc[e] . . . various biases[.]" *Ballew v. Georgia*, 435 U.S. 223, 233–34 (1978). Additionally, the typical requirement that criminal verdicts be unanimous "ensure[s] careful assessment of the evidence by the jury, enable[s] minority viewpoints to be heard and considered, and reinforce[s] the requirement of proof beyond a reasonable doubt." 6 LaFave, *Criminal Procedure*, at § 22.1(c), p. 25.

Beyond these protections, the Sixth Amendment affords defendants the right not to be convicted except by a jury drawn from the district where the crime was committed and selected from a representative cross section of the community. *Taylor v. Louisiana*, 419 U.S. 522, 530 (1975). The Court explained in *Taylor* that these requirements are "fundamental to the jury trial guaranteed by the Sixth Amendment," which "'presupposes a jury drawn from a pool broadly representative of the community as well as impartial in a specific case.'" *Id.* (quoting *Thiel v. S. Pac. Co.*, 328 U.S. 217, 227 (1946) (Frankfurter, J., dissenting)).

Among other benefits, these features of the American system afford a greater chance that at least one juror will see things the defendant's way, expose improper biases of other jurors, persuade other jurors against a biased verdict, and even foil an unjust result. In short, these structural and participatory safeguards, most of which have existed since the earliest days of the American jury system,

exist in part to expose or neutralize any improper biases and motivations of jurors (and potential jurors).

Modern practices of peremptory challenges and *Batson* objections add yet more layers of protection from bias. Defense lawyers have the opportunity to ask jurors about biases, affinities, and points of view that might harm their clients, and then to strike jurors they suspect of harboring prejudices. They may also challenge the prosecution for dismissing jurors out of racial bias and other improper prejudices.

Here, the deliberative process itself ultimately exposed Juror H.C.'s biases so that jurors could both confront and account for them. Once the verdict is returned and the judgment entered, all must respect the capacity of jurors to grapple appropriately with expressions of racial bias during deliberations, just as they must respect the capacity of jurors to sift and weigh complex, contradictory evidence on many other matters. *Cf. Farmer*, 717 F.3d at 565–66 (observing, regarding claims of premature deliberation, "[w]e count on the court's final instructions to the jurors and the gravity of the group deliberations to rein in jurors who may struggle with or even make light of their important responsibilities"); *United States v. Paneras*, 222 F.3d 406, 411 (7th Cir. 2000) ("In this situation, it is significant that the [juror's cartoon rendering of trial events] expressed one juror's view of the case, and was subject to the scrutiny and the questioning of other jurors.").

2. Trusting juries to expose and address bias during deliberations may not achieve perfect, unbiased verdicts in every case, but doing so surely balances costs and benefits better than the rule Petitioner urges. If judges and litigants were permitted to peek inside the jury room following a verdict, "[t]here is little doubt" such investigation would "in some instances lead to the invalidation of verdicts reached after irresponsible or improper juror behavior." *Tanner*, 483 U.S. at 120.

And if post-verdict inquiry would indeed yield evidence of improper verdicts in a significant percentage of cases, "[i]t is not at all clear that the jury system could survive such efforts to perfect it." *Id.* "Allegations of juror misconduct, incompetency, or inattentiveness, raised for the first time days, weeks, or months after the verdict, seriously disrupt the finality of the process." *Id.*; *see also Farmer*, 717 F.3d at 564 ("[T]he jury system cannot afford to allow the perfect to become the enemy of the good."); *State v. Boyles*, 567 N.W.2d 856, 860 (S.D. 1997) ("The best justification of the rule is . that it protects a good system that cannot be made perfect." (quoting Christopher B. Mueller & Laird C. Kirkpatrick, 3 *Federal Evidence* § 247, at 55 (2d ed. 1994))).

Where jury verdicts are merely the starting point for multiple regressions of factual analysis, the utility of using juries to decide factual disputes—and even the fulfillment of the constitutional right to a jury decision—becomes questionable. Petitioner seeks a special exception for evidence of juror racial

bias, but the existence of such bias is far from the only form of juror misconduct that may necessitate a new trial under the Sixth and Seventh Amendments. And while the Constitution in some contexts provides special substantive protections against racial bias, it is hard to see how that could translate into a special rule of evidence. A criminal defendant unjustly convicted by jurors who drank alcohol and used drugs during the course of deliberations, *see Tanner*, 483 U.S. at 113–15, would surely have equal claim to a right to use juror testimony as evidence. And defendants who believe their convictions were tainted by other types of bias could claim the same right, even *decades* after entry of the verdict against them. *See, e.g., Rhines v. Young*, 2016 WL 3661223, at *2–3 (D. S.D. July 5, 2016) (denying habeas petitioner's motion to alter or amend judgment—"roughly twenty years" post-conviction—based on "newly discovered evidence" that jurors "harbored anti-homosexual bias" against the petitioner).

Yet permitting examination of jury deliberations for evidence of any type of misconduct that could justify a new trial would insert judges, post hoc, into the deliberative conversation. The Seventh Circuit has explained that when evaluating a defendant's request for a new trial based on juror misconduct, "[e]ach case turns on its own facts, and on the degree and pervasiveness of the prejudicial influence possibly resulting" from the alleged misconduct. *Paneras*, 222 F.3d at 411 (quotation and citation omitted). The defendant is entitled to a new trial when there is a "reasonable possibility" that juror

misconduct had a prejudicial effect on the jury verdict. *Id.*

Thus, among other inquiries, judges considering post-verdict motions predicated on juror statements during deliberations would need to consider the weight and sincerity of those statements, testimony concerning jurors' body language and attentiveness during deliberations, and even the weight of evidence supporting the verdict. For if Rule 606(b) does not preclude using jurors' deliberative statements as evidence of racial bias, surely it does not preclude use of other deliberative statements for purposes of considering prejudicial effect. Plainly, that sort of inquiry would seriously undermine the ability of juries to decide factual questions independently. The same is not true, it must be said, for *external* evidence of juror misconduct, which does not by its nature insert the court into the middle of the deliberative process.

It should also be plain that the rule Petitioner seeks may be brought to bear on *every* jury verdict. After all, no trial is perfect, and it is not uncommon for jurors to make post-verdict statements calling into question the legitimacy of their verdicts. *See, e.g.*, Marc Freeman, *Bullying Claim May Lead to Retrial*, Sun Sentinel, Feb. 23, 2016, at 1A (reporting a juror's post-conviction claim that she and other jurors were "bullied" during deliberations in a murder trial); Bridget Murphy, *Second Juror Claims Misconduct*, Newsday, Mar. 7, 2015, at A10 (reporting post-verdict allegations by two jurors that fellow jurors discussed the case before deliberations,

joked about the defendant's testimony, and made comments about wanting to "take a detective's gun and shoot the defense attorney"); Daphne Duret, *Juror Has Doubts of Goodman's Guilt*, Palm Beach Post, May 1, 2012, at 1A (reporting juror's post-verdict allegation that other jurors had pushed him to find the defendant guilty "and had their minds made up before deliberation began"). Dissatisfied litigants can even hire firms to conduct post-verdict juror interviews "to provide unique insights into the jurors' deliberations and reasoning processes." *FAQs*, Nat'l Jury Project Litig. Consulting, http://www.njp.com/services.html (last visited Aug. 30, 2016). Jurors' post-verdict critiques of deliberations will only proliferate in a system where they can be used to impeach verdicts.

Accordingly, while litigants have "a *powerful* interest in ensuring that the jury carefully and impartially considers the evidence," that interest does not outweigh the "*compelling* interests [in] prohibiting testimony about what goes on in the jury room after a verdict has been rendered." *Benally*, 546 F.3d at 1234 (emphasis added). Rules protecting jury secrecy "exist[] for good reason," as they "maintain[] the integrity and finality of jury verdicts." *Leung*, 796 F.3d at 1036.

There always has been a certain "black box" quality to the jury system. Outsiders cannot know exactly how and why juries reach the decisions they do, even with the benefit of post-verdict juror statements. That reality can sometimes be frustrating, but it has long been the price of a

functioning jury system. Without jury finality and secrecy, courts would be stuck in an endless search for whether each verdict is "correct." If that were possible, we wouldn't need juries.

CONCLUSION

The decision below should be affirmed.

Respectfully submitted,

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APPENDIX

STATE NO-IMPEACHMENT RULES		
State	Rule	Applied State Law Racial Bias Exception
AL	Ala. R. Evid. 606	
AK	Alaska R. Evid. 606	
AZ	Ariz. R. Evid. 606; Ariz. R. Crim. P 24.1	
AR	Ark. R. Evid. 606	
CA	Cal. Evid. Code § 1150	
CO	Colo. R. Evid. 606	
CT	*Aillon v. State*, 363 A.2d 49 (Conn. 1975)	*State v. Santiago*, 715 A.2d 1 (Conn. 1998)
DC	*Sellars v. United States*, 401 A.2d 974 (D.C. 1979)	

State	Rule	Applied State Law Racial Bias Exception
DE	Del. R. Evid. 606	*Fisher v. State*, 690 A.2d 917 (Del. 1996)
FL	Fla. Stat. § 90.607	*Powell v. Allstate Ins. Co.*, 652 So.2d 354 (Fla. 1995)
GA	Ga. Code Ann. § 24-6-606	
HI	Haw. R. Evid. 606	*State v. Jackson*, 912 P.2d 71 (Haw. 1996)
ID	Idaho R. Evid. 606	
IL	Ill. R. Evid. 606	
IN	Ind. R. Evid. 606	
IA	Iowa R. Evid. 5.606	
KS	Kan. Stat. Ann. §§ 60-441, -444	

State	Rule	Applied State Law Racial Bias Exception
KY	*Brown v. Commonwealth*, 174 S.W.3d 421 (Ky. 2005)	
LA	La. Code Evid. art. 606	
ME	Me. R. Evid. 606	
MD	Md. R. 5-606	
MA	Mass. G. Evid. 606	*Commonwealth v. McCowen*, 939 N.E.2d 735 (Mass. 2010)
MI	Mich. R. Evid. 606	
MN	Minn. R. Evid. 606	*State v. Bowles*, 530 N.W.2d 521 (Minn. 1995)
MS	Miss. R. Evid. 606	
MO	*Fleshner v. Pepose Vision Inst., P.C.*, 304 S.W.3d 81 (Mo. 2010) (en banc)	*Fleshner v. Pepose Vision Inst., P.C.*, 304 S.W.3d 81 (Mo. 2010) (en banc)

State	Rule	Applied State Law Racial-Bias Exception
MT	Mont. R. Evid. 606	
NE	Neb. Rev. Stat. § 27-606	
NV	Nev. Rev. Stat. § 50.065	
NH	*Kravitz v. Beech Hill Hosp., L.L.C.*, 808 A.2d 34 (N.H. 2002)	
NJ	*State v. Kociolek*, 118 A.2d 812 (N.J. 1955)	*State v. Levitt*, 176 A.2d 465 (N.J. 1961)*
NM	N.M. R. Evid. 11 606	
NY	*Sharrow v. Dick Corp.*, 653 N.E.2d 1150 (N.Y. 1995)	

The CACL amicus brief cites *Levitt* as creating an exception based on the Sixth Amendment, CACL Br. at 3a, but the case is at best ambiguous on the source (as are other New Jersey precedents), so the *amici* States have counted it as a state-law exception.

State	Rule	Applied State Law Racial Bias Exception
NC	N.C. R. Evid. 606	
ND	N.D. R. Evid. 606	*State v. Hidanovic*, 747 N.W.2d 463 (N.D. 2008)
OH	Ohio R. Evid. 606	
OK	Okla. Stat. tit. 12, § 2606	
OR	*Carson v. Brauer*, 382 P.2d 79 (Or. 1963) (en banc)	*State v. Gardner*, 371 P.2d 558 (Or. 1962)
PA	Pa. R. Evid. 606	
RI	R.I. R. Evid. 606	*State v. Brown*, 62 A.3d 1099 (R.I. 2013)
SC	S.C. R. Evid. 606	
SD	S.D. Codified Laws § 19-19-608	
TN	Tenn. R. Evid. 606	

State	Rule	Applied State Law Racial Bias Exception
TX	Tex. R. Evid. 606	
UT	Utah R. Evid. 606	
VT	Vt. R. Evid. 606	
VA	Va. R. Sup. Ct. 2:606	
WA	*Gardner v. Malone*, 376 P.2d 651 (Wash. 1962)	*City of Seattle v. Jackson*, 425 P.2d 385 (Wash. 1967)
WV	W. Va. R. Evid 606	
WI	Wis. Stat. § 906.06	
WY	Wyo. R. Evid. 606	

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IN THE

Supreme Court of the United States

MIGUEL ANGEL PEÑA-RODRIGUEZ
Petitioner,

v.

STATE OF COLORADO,
Respondent.

On Writ of Certiorari to the Colorado Supreme Court

BRIEF OF *AMICI CURIAE* NAACP LEGAL DEFENSE & EDUCATIONAL FUND, INC., THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, AND THE AMERICAN CIVIL LIBERTIES UNION IN SUPPORT OF PETITIONER

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Other Authorities

Alexis de Tocqueville, *Democracy in America* (Henry Reeve trans., George Adlar 1840) 9, 20

Barbara E. Bergman et al., Wharton's Criminal Evidence (15th ed. 1999) 15

Benjamin T. Huebner, *Beyond* Tanner*: An Alternative Framework for Postverdict Juror Testimony*, 81 N.Y.U. L. Rev. 1469 (2006) 18

Brief of the NAACP Legal Defense and Educational Fund, Inc. as *Amicus Curiae* in Support of Petitioner, *Sterling v. Dretke*, 117 Fed. App'x 328 (5th Cir.) (unpublished), *cert. denied*, 544 U.S. 1053 (2005), 2005 WL 952252 (Apr. 22, 2005) 16

Charles Abrams, *Forbidden Neighbors: A Study of Prejudice in Housing* (1955) *in The Suburb Reader* (Becky M. Nicolaides & Andrew Wiese eds., 2006) 11

Charles A. Wright & Victor J. Gold, Fed. Prac. & Proc.: Evid. (2d ed. 2016) ..... *passim*

CNN/ORC Poll of December 22, 2014, http://i2.cdn.turner.com/cnn/2014/images/12/22/cnn.poll.12.22 24

Colin Miller, *Dismissed with Prejudice: Why Application of the Anti-Jury Impeachment Rule to Allegations of Racial, Religious, or Other Bias Violates the Right to Present a Defense*, 61 Baylor L. Rev. 872 (2009) 10

Edmonson v. Leesville Concrete Co., No. 89-7743, 1991 WL 636291 (U.S. Oral Arg., Jan. 15, 1991) 6

Edward J. Imwinkelreid & Paul C. Giannelli, Courtroom Criminal Evidence (Lexis Nexis, 5th ed. 2015) 14, 15

Edward T. Swaine, *Pre-Deliberations Juror Misconduct, Evidential Incompetence, and Juror Responsibility*, 98 Yale L.J. 187 (1988) 17

Fed. R. Evid. 606(b) ..... *passim*

Fed. R. Evid. 606 Advisory Committee's Notes 7

Federal Evidence (4th ed. 2016) 15

George Gallup, Jr., *The Gallup Poll: Public Opinion* (1996) 24

John C. Tucker, *Trial and Error: The Education of a Courtroom Lawyer* (2003) 11

King's Dream Remains an Elusive Goal; Many Americans See Racial Disparities, Pew Research Ctr. (Aug. 22, 2013), http://www.pewsocialtrends.org/2013/08/22/kings-dream-remains-an-elusive-goal-many-americans-see-racial-disparities/ 24-25

Mark W Bennett, *Unraveling the Gordian Knot of Implicit Bias in Jury Selection: The Problems of Judge-Dominated Voir Dire, the Failed Promise of Batson, and Proposed Solutions*, 4 Harv. L. & Pol'y Rev. 149 (2010) 19

Nicholas S. Bauman, *"Extraneous Prejudicial Information": Remedying Prejudicial Juror Statements Made During Deliberations*, 55 Ariz. L. Rev 775 (2013) 17

Racist Juror Misconduct During Deliberations, 101 Harv. L. Rev. 1595 (1988) 17, 23

Reason-Rupe Public Opinion Survey, October 2014 National Telephone Survey. Reason-Rupe, http://reason.com/assets/db/1412808480505.xlsx 24

Richard Kluger, *Simple Justice* (Vintage Books, 1977 ed.) 12-13

Robert P Jones, Daniel Cox & Juhem Navarro-Rivera, *Economic Insecurity, Rising Inequality, and Doubts about the Future: Findings from the 2014 American Values Survey*, Pub. Religion Research Inst. (Sept. 23, 2014), http://publicreligion.org/site/wp-content/uploads/2014/11/PRRI-AVS-with-Transparancy-Edits.pdf 24

Statement by the NAACP Legal Defense and Educational Fund, Inc. before the President's Task Force on 21st Century Policing (Jan. 13, 2015), *available at* http://www.naacpldf.org/document/ldf-testimony-presidents-task-force-21st-century-policing 2

Testimony of Sherrilyn Ifill to the United States Senate Judiciary Committee, Subcommittee on Oversight, Agency Action, Federal Rights and Federal Courts (Nov. 17, 2015), *available at* http://www.naacpldf.org/document/ldf-testimony-senate-judiciary-committee%E2%80%99s-subcommittee-oversight-agency-action-federal-rig 2

William Blackstone, *Commentaries on the Laws of England* (William D. Lewis ed., Rees Welsh & Co. 1900) 8-9, 16

INTEREST OF *AMICI CURIAE* [1]

The NAACP Legal Defense & Educational Fund, Inc. ("LDF") is the nation's first and foremost civil rights law organization. Through litigation, advocacy, public education, and outreach, LDF strives to secure equal justice under the law for all Americans, and to break down barriers that prevent African Americans from realizing their basic civil and human rights.

LDF has long been concerned about the influence of race on the administration of the criminal justice system in particular and with laws, policies, and practices that have a disproportionate negative impact on communities of color, especially African Americans. For example, LDF served as counsel of record in cases challenging racial bias in the criminal justice system, including the racial make-up of juries, *Swain v. Alabama*, 380 U.S. 202 (1965), *Alexander v. Louisiana*, 405 U.S. 625 (1972), and *Ham v. South Carolina*, 409 U.S. 524 (1973); pioneered the affirmative use of civil actions to end jury discrimination in *Carter v. Jury Commission*, 396 U.S. 320 (1970), and *Turner v. Fouche*, 396 U.S. 346 (1970); and appeared as *amicus curiae* in cases involving the use of race in peremptory challenges in *Johnson v. California*, 543 U.S. 499 (2005), *Miller-El v. Cockrell*, 537 U.S. 322 (2003), *Georgia v. McCollum*, 505 U.S. 42 (1992), *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614 (1991), and *Batson v. Kentucky*, 476 U.S. 79 (1986) (overruling *Swain*). LDF also recently testified before the United States

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amici curiae* state that no counsel for a party authored this brief in whole or in part and that no person other than *amici curiae*, their members, or their counsel made a monetary contribution to the preparation or submission of this brief. All parties have consented to the filing of this brief.

Congress, as well as the President's Task Force on 21st Century Policing, about the prevalence of racial bias throughout the criminal justice system and the need to eliminate such discrimination in order to foster confidence and trust in our public institutions.[2] LDF is also lead counsel in *Buck v. Stephens*, 630 F. App'x 251 (5th Cir. 2015), *cert. granted*, No. 15-8049, 2016 WL 531661 (U.S. June 6, 2016), a case involving the explicit use of race in capital sentencing in which this court recently granted certiorari.

The National Association of Criminal Defense Lawyers (NACDL) is a nonprofit voluntary professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct. Founded in 1958, NACDL has a nationwide membership of 9,000 direct members and up to 40,000 with affiliates. NACDL's members include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges. NACDL is the only nationwide professional bar association for public defenders and private criminal defense lawyers. NACDL is dedicated to advancing the proper, efficient, and just administration of justice. NACDL files numerous amicus briefs each year in the U.S. Supreme Court and other federal and state courts, seeking to

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[2] *See* Testimony of Sherrilyn Ifill to the United States Senate Judiciary Committee, Subcommittee on Oversight, Agency Action, Federal Rights and Federal Courts (Nov. 17, 2015), *available at* http://www.naacpldf.org/document/ldf-testimony-senate-judiciary-committee%E2%80%99s-subcommittee-oversight-agency-action-federal-rig; Statement by the NAACP Legal Defense and Educational Fund, Inc. before the President's Task Force on 21st Century Policing (Jan. 13, 2015), *available at* http://www.naacpldf.org/document/ldf-testimony-presidents-task-force-21st-century-policing.

provide *amicus* assistance in cases that present issues of broad importance to criminal defendants, criminal defense lawyers, and the criminal justice system as a whole. NACDL has a particular interest in ensuring that rules of evidence are interpreted and applied in a manner consistent with a criminal defendant's constitutional right to a full and fair trial by an impartial jury.

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with approximately 500,000 members dedicated to the principles of liberty and equality embodied in the Constitution. Since its involvement in the Scottsboro cases more than 80 years ago, *Powell v. Alabama*, 287 U.S. 45 (1932) and *Patterson v. Alabama*, 294 U.S. 600 (1935), the ACLU has been deeply engaged in identifying and addressing the persistence of racial discrimination in our criminal justice system—from policing to prosecution to sentencing—and has appeared before this Court in numerous cases raising those issues, both as direct counsel and as *amicus* curiae.

Given their expertise in matters concerning the influence of race on the criminal justice system, *amici* believe their perspective would be helpful to the Court in resolving the important constitutional issues presented by this case.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case involves the extreme and explicit injection of racial prejudice into a jury's deliberative process—through, in part, a juror's use of racial slurs and stereotypes linking race to criminality. During deliberations on the guilt or innocence of Petitioner, Miguel Angel Peña-Rodriguez, one juror repeatedly

urged his fellow jurors to use Mr. Peña-Rodriguez's ethnicity as a basis for conviction. The juror argued that Mr. Peña-Rodriguez was guilty "because he's Mexican and Mexican men take whatever they want." Pet. App. 4a-5a. The juror referenced his own "experience as an ex-law enforcement officer" where he purportedly observed on "patrol, nine times out of ten Mexican men were guilty of being aggressive toward women " *Id.* This juror also asserted that an alibi witness's testimony was not credible because he was an "illegal" (in fact, the witness was a lawful permanent resident). Pet. Br. 8.

This egregious display of racial bias was voluntarily reported by two concerned members of the same jury and decisively documented in affidavits. Yet, the Colorado Supreme Court held that, notwithstanding the Sixth Amendment's guarantee of an impartial jury, this extreme misconduct was insulated from judicial review because the state rules of evidence generally bar the admission of juror testimony to impeach a jury verdict (the "no-impeachment" rule).

Amici represent three leading legal organizations that work on a wide range of civil rights, civil liberties, racial justice, and criminal justice issues in jurisdictions across the country. Two of the *amici* filed briefs at the certiorari stage in this case, to elucidate the important issues that it raises. Now, all three join together to urge the Court to recognize the constitutional limits of the "no-impeachment" rule in cases involving racially-prejudiced juror misconduct, and to highlight two key reasons for reversing the Colorado Supreme Court.

First, for over a century, this Court has strived to eradicate racial bias from our criminal justice system writ large. Because racial bias and discrimination in the jury system uniquely undermines the proper

functioning of the criminal justice system, this Court has consistently treated such discrimination as an exceptional harm that requires exceptional remedies. Recent national events exposing the stubborn persistence of racial bias in the administration of criminal justice powerfully reinforce the continued need for this Court's commitment to fair and race-neutral criminal proceedings.

Yet, despite this Court's longstanding concerns, the Colorado Supreme Court fundamentally misconstrued the constitutional significance of racial bias in jury deliberations. It failed to appreciate this Court's well-established precedents addressing both the special harms of racial bias in jury decision-making and the critical importance of public confidence in the operation of our system of justice. In doing so, the Colorado Supreme Court subjugated Mr. Peña-Rodriguez's federal Sixth Amendment rights to the state policy concerns that animate Colorado's state rules of evidence.

Second, allowing racial bias to fester in the jury system has grave ramifications for public confidence in the criminal justice system at several levels. Leaving the lower court's decision in place raises the risk of apparent and actual bias for an individual facing criminal charges in what should be fair and impartial judicial proceedings. It erodes community trust in the objectivity and accuracy of jury verdicts and the legal system overall. It also undermines central democratic ideals of fairness and equality that the jury and the Sixth Amendment's guarantee of impartiality aim to uphold. Thus, the Colorado Supreme Court's refusal to allow the lower court to even *consider* the undisputed racial prejudice that tainted Mr. Peña-Rodriguez's jury deliberations not only harmed Mr. Peña-Rodriguez in a very tangible way, but also

undermined public confidence in this particular jury verdict and the fair operation of the judicial system generally.

Were this Court to affirm Colorado's decision to insulate overt juror racial discrimination, it would send an ominous signal to jurors, judges, defendants, and the public that the courts condone racially biased verdicts. As this Court has repeatedly declared, however, this simply cannot be true. Given the egregiousness of this case and the growing public concerns about racial bias in our criminal justice system, it is imperative for this Court to reaffirm its existing precedents regarding the sanctity of the Sixth Amendment and the integrity of the justice system.

Ultimately, defendants and jurors alike should be able to enter the courthouse, "believing that times ha[ve] changed" and "confident that justice [will] be guided by the promise that they would be judged not by the color of their skin, but by the content of their character."[3] That promise was broken for Mr. Peña-Rodriguez, but this Court can and should restore that covenant by correcting the overt and extreme racial prejudice that infected the jury verdict in the proceedings below.

ARGUMENT

After two jurors came forward to report how racial animus had tainted the jury's deliberations, Mr. Peña-Rodriguez claimed that this prejudice violated his Sixth Amendment constitutional right to trial "by an

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[3] *Edmonson v. Leesville Concrete Co.*, No. 89-7743, 1991 WL 636291, at *29 (U.S. Oral Arg., Jan. 15, 1991).

impartial jury," U.S. Const. Amend. VI,[4] and sought a new trial. A bare majority of the Colorado Supreme Court affirmed Mr. Peña-Rodriguez's conviction based on Colorado's "no-impeachment" rule, which closely mirrors Federal Rule of Evidence 606(b) and reflects the general common law practice that juror testimony is not normally admissible to impeach a jury verdict.[5] *Amici* urge this Court to make clear that the Sixth Amendment right to an impartial jury indisputably trumps the policy considerations underlying state evidentiary rules—especially where, as here, a juror contaminated the deliberation process with egregious and explicit racial bias.

I. THE RIGHT TO AN IMPARTIAL JURY INCLUDES THE RIGHT TO A JURY DETERMINATION UNCORRUPTED BY RACIAL PREJUDICE.

For over a century. strong majorities of this Court have repeatedly recognized that racial prejudice in the jury system is an exceptional problem meriting recurrent and decisive interventions. This is because the right to a trial reflects "a fundamental decision about the exercise of official power—a reluctance to entrust plenary powers over the life and liberty of the citizen to one judge or to a group of judges," rather than a defendant's fellow citizens. *Duncan v. State of*

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[4] The Fourteenth Amendment, which makes the Sixth Amendment applicable to the states, likewise provides a coterminous right to an impartial jury. *See, e.g.*, Pet. 12 n.3. Throughout this brief, we refer to this simply as a Sixth Amendment right.

[5] The Rule says that this practice promotes the "freedom of deliberation," "finality of verdicts," and "protection of jurors against annoyance," Fed. R. Evid. 606 Advisory Committee's Notes.

La., 391 U.S. 145, 155-56 (1968). This investiture of judicial power in the community upholds democratic principles of sovereignty and legitimacy by "ensur[ing] continued acceptance of the laws by all of the people." *Edmonson*, 500 U.S. at 624 (quoting *Powers v. Ohio*, 499 U.S. 400, 407 (1991)) (internal quotation marks omitted).

Juries also serve as the principal means of protecting the American citizenry from the State's potential misuse of its broad powers to confine or execute its citizens. *See, e.g., Glasser v. United States*, 315 U.S. 60, 84 (1942) (the jury serves as the "prized shield against oppression"); *Batson v. Kentucky*, 476 U.S. 79, 86 (1986) ("The petit jury has occupied a central position in our system of justice by safeguarding a person accused of crime against the arbitrary exercise of power by prosecutor or judge."); *see also Batson*, 476 U.S. at 87 (arguing that juries ensure the "'protection of life and liberty against race or color prejudice.'") (citation omitted). The right to an impartial jury trial establishes "an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge," "prevent[s] oppression by the Government," and "protect[s] against unfounded criminal charges" and "arbitrary law enforcement." *Duncan*, 391 U.S. at 155-56. Indeed, jurists and historians alike have long recognized these critical functions of the jury, dating back to our nation's founding.[6]

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[6] *See, e.g., Irvin v. Dowd*, 366 U.S. 717, 721 (1961) ("England, from whom the Western World has largely taken its concepts of individual liberty and of the dignity and worth of every man, has bequeathed to us safeguards for their preservation, the most priceless of which is that of trial by jury."); *see also* 3 Blackstone, William, *Commentaries on the Laws of England* *380 (William D.

In order to ensure that the jury is able to fulfill these vital functions, this Court has enacted a range of procedural safeguards and substantive requirements. Chief among them is the right to a jury untainted by racial bias because "[a] juror who allows racial bias to influence assessment of the case breaches the compact [between judge and jury] and renounces his or her oath." *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 153 (1994) (Kennedy, J., concurring in the judgment). Indeed, this Court has unequivocally declared that "discrimination on the basis of race, odious in all aspects, is especially pernicious in the administration of justice," *Rose v. Mitchell*, 443 U.S. 545, 555 (1979); *see also id.* at 558-59, and "nothing would be more pernicious to the jury system than for society to presume that persons of different backgrounds go to the jury room to voice prejudice," *J.E.B.*, 511 U.S. at 154.

A. The Colorado Supreme Court Misapprehended the Constitutional Import of Racial Prejudice in the Jury System as a Uniquely Harmful and Critical Issue.

"It [would be] an affront to justice to argue that a fair trial includes the right to discriminate against a group of citizens based upon their race." *Georgia v. McCollum*, 505 U.S. 42, 57 (1992). Jury-related discrimination is inimical to our judicial system and

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Lewis ed., Rees Welsh & Co. 1900) (stressing the significance of unbiased jury members, who are "the best investigators of truth, and the surest guardians of public justice."); 1 Alexis de Tocqueville, *Democracy in America* 282 (Henry Reeve trans., George Adlar 1840) (arguing that jury service is "as direct and as extreme a consequence of the sovereignty of the people as universal suffrage").

"an impediment to securing to [Black citizens] that equal justice which the law aims to secure to all others.'" *Batson*, 476 U.S. at 87-88 (quoting *Strauder v. West Virginia*, 100 U.S. 303, 308 (1879)). In the context of criminal proceedings, the taint of racial bias can contaminate critical decisions affecting a defendant's liberty, life, and death.[7] A single juror harboring racial bias can infect every aspect of the deliberations and undermine the integrity of the particular case and the justice system as a whole.[8]

With respect to jury selection, this Court has consistently vacated criminal convictions that were compromised by racial bias because "a defendant has the right to an impartial jury that can view him without racial animus, which so long has distorted our system of criminal justice." *McCollum*, 505 U.S. at 58. *See also Powers*, 499 U.S. at 411 (referencing a defendant's "right to be tried by a jury free from ethnic [or] racial prejudice"); *Batson*, 476 U.S. 79; *Miller-El v. Dretke*, 545 U.S. 231 (2005); *Snyder v.*

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[7] Especially troubling is the possibility that an individual could be sentenced to death by a racially biased jury and that a rule of evidence could trump constitutional protections and prevent any examination of such a claim. *See, e.g.*, Colin Miller, *Dismissed with Prejudice: Why Application of the Anti-Jury Impeachment Rule to Allegations of Racial, Religious, or Other Bias Violates the Right to Present a Defense*, 61 Baylor L. Rev. 872, 897-98 (2009) (analyzing capital cases where Rule 606(b) was applied to prevent jurors from impeaching their verdicts with evidence of racial bias).

[8] *See Dyer v. Calderon*, 151 F.3d 970, 973 (9th Cir.) ("The bias or prejudice of even a single juror would violate [the defendant]'s right to a fair trial."), *cert. denied*, 525 U.S. 1033 (1998); *United States v. Hendrix*, 549 F.2d 1225, 1227 (9th Cir.) ("If only one juror is unduly biased or prejudiced the criminal defendant is denied his Sixth Amendment right to an impartial panel."), *cert. denied*, 434 U.S. 818 (1977).

Louisiana, 552 U.S. 472 (2008); *Foster v. Chatman*, 136 S. Ct. 1737 (2016). "[O]ver a century of jurisprudence [has been] dedicated to the elimination of race prejudice within the jury selection process." *Edmonson*, 500 U.S. at 618 (concluding that racial discrimination in the jury system is impermissible in civil, as well as criminal, proceedings).

While racial discrimination in jury selection centers on an attorney's discriminatory use of peremptory challenges to exclude members of protected groups from the jury, as opposed to the racial discrimination exhibited by a seated juror during jury deliberations, both forms of discrimination undermine the integrity of the jury process and public confidence in the justice system. "We do not prohibit racial bias in jury selection only to encourage it in jury deliberations. Once seated, a juror should not give free rein to some racial bias of his or her own." *J.E.B.*, 511 U.S. at 153 (Kennedy, J., concurring in the judgment).[9] Indeed, race discrimination should play *no part* in the justice system at *any* stage: "In our heterogeneous

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[9] In some instances, biased juries issued verdicts as a symbol of resistance to integration and civil rights laws. *See, e.g.*, John C. Tucker, *Trial and Error: The Education of a Courtroom Lawyer* 288 (2003) (jury foreman said he hoped that the verdict, ruling against Black homeowners in a housing segregation case, would help end "the mess Earl Warren made with *Brown v. Board of Education* and all that nonsense"). In others, prejudiced juries issued indictments in ways that endorsed or exacerbated racial violence. *See, e.g.*, Charles Abrams, *Forbidden Neighbors: A Study of Prejudice in Housing* 103-19 (1955), *in The Suburb Reader* 328-30 (Becky M. Nicolaides & Andrew Wiese eds., 2006) (grand jury refused to indict the white mob that attacked the family of a Black veteran that had moved into an all-white apartment building, instead charging the family's NAACP attorney and the apartment building's owner, attorney, and agent).

society policy as well as constitutional considerations militate against the divisive assumption—as a *per se* rule—that *justice* in a court of law *may turn upon* the pigmentation of skin, the accident of birth, or the choice of religion." *Ristaino v. Ross*, 424 U.S. 589, 596 n.8 (1976) (emphasis added).

In the jury deliberation context, this Court has warned that "[t]here may be cases of juror bias so extreme that, almost by definition, the jury trial right has been abridged," *Warger v. Shauers*, 135 S. Ct. 521, 529 n.3 (2014). If this case, involving multiple statements of overt racial and ethnic bias does meet that standard, it is hard to imagine any constitutional limits on "no-impeachment" rules.

The promise and protection of jury impartiality, as codified in the Sixth Amendment, has even greater constitutional significance in light of the Equal Protection Clause of the Fourteenth Amendment. Because "[e]radication of the evil of state supported racial prejudice is at the heart of the Fourteenth Amendment," the "constitutional interests of the affected party are at their strongest when a jury employs racial bias. " 27 Charles A. Wright and Victor J. Gold, Fed. Prac. & Proc.: Evid. § 6074 (2d ed. 2016) (footnotes omitted). Indeed, the Reconstruction Amendments took specific aim at both racial exclusion in jury selection and racial prejudice in jury deliberations:

> A principal gain under that [Reconstruction] program, implicit in the Fourteenth Amendment and made explicit under the 1875 Civil Rights Act, was the right to a fair jury trial. The Fourteenth Amendment and the 1875 follow-up legislation had pounded the point [of the Sixth Amendment] home. Their purpose in this connection was quite obviously to integrate

> Negroes into the jury system in order to assure the black man of an impartial trial and thereby counteract a presumed hostility of white jurors toward black defendants.

Richard Kluger, *Simple Justice* 62-64 (Vintage Books, 1977 ed.).[10]

Thus, the Colorado Supreme Court committed a serious error in refusing to consider the extreme and explicit evidence that racial prejudice played a role in the jury deliberations in this case. In doing so, it ignored this Court's instructions about the special salience of racial bias in the jury system and the constitutional imperative to remove racial animus—an "especially pernicious" form of bias—from the criminal justice system. *See Rose*, 443 U.S. at 555-56. The Colorado Supreme Court failed to acknowledge this Court's denunciation of how "racial animus" intolerably "distort[s] our system of criminal justice" *McCollum*, 505 U.S. at 58, and subverts the foundational purposes of the constitutional right to a jury trial, *see id.* at 49-51. In fact, only the dissent below noted that "[r]acial bias differs from other forms of bias in that it compromises institutional legitimacy." Pet. App. 25a. Instead, the decision below erroneously suggests that the Sixth Amendment has little, if any, import or impact on a case where explicit

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[10] Even the adversaries of the Fourteenth Amendment understood that it would apply specifically to racial discrimination in jury participation, Kluger, *supra*, at 426 (chronicling the opposition of Delaware), and thereby bolster Sixth Amendment rights, *see generally* Amicus Br. of Constitutional Accountability Center (discussing how the Framers of the Reconstruction Amendments viewed eliminating racial bias from jury deliberations as critical to vindicating the protections of both the Sixth and Fourteenth Amendments).

racial prejudice has tainted a jury verdict.[11] Such a position should not be tolerated by this Court.

B. Policy Concerns Underlying No-Impeachment Rules Cannot Override Constitutional Rights.

The Colorado Supreme Court's plain error in equating the constitutional right to a fair trial with an evidentiary rule invites this Court's reversal. Pet. App. 2a (comparing "two fundamental tenets": "a defendant's constitutional right to an impartial jury" and the protections of the state's "no-impeachment" rule); Pet. App. 18a (Márquez, J., dissenting) ("[T]he majority elevates general policy interests [over the] fundamental constitutional right to a fair trial."). It is axiomatic that the United States Constitution is the supreme law of the land and has precedence over state rules of evidence, which cannot be accorded the same legal weight as constitutional mandates. *See* U.S. Const. Art. VI (Supremacy Clause); *see also Crawford v. Washington*, 541 U.S. 36, 51 (2004) ("[W]e once again reject the view that the Confrontation Clause['s] application depends upon 'the law of Evidence for the time being.'"); 1 Edward J. Imwinkelreid & Paul C. Giannelli, Courtroom Criminal Evidence § 4 (Lexis Nexis, 5th ed. 2015) ("The first source of state law evidence [in the hierarchy] is the federal Constitution. A fourth source is the state's statutes [including rules of evidence].").

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[11] It would be strange and troubling if other forms of misconduct provide grounds to revisit verdicts in criminal cases—but not racial prejudice. For example, the Tenth Circuit held that a verdict cannot stand when a stenographer emphasized parts of the jury instructions while reading them to the jury in the jury room. *Little v. United States*, 73 F.2d 861, 867 (10th Cir. 1934).

Thus, "[i]f the exercise of an evidentiary rule impinges upon a criminal defendant's constitutional rights, the evidence rule must give way to the defendant's right to a fair trial " 3 Barbara E. Bergman et al., Wharton's Criminal Evidence § 11:6 (15th ed. 1999). *See also* Imwinkelreid & Giannelli, *supra*, § 6 (in the event of "a conflict between a provision of the federal Constitution and a state statute the Constitution prevails under the supremacy clause."); Wright & Gold, *supra*, § 6074 ("Evidentiary rules that insulate from discovery the violation of constitutional rights may themselves violate those rights."); 2 Federal Evidence § 5:10 (4th ed. 2016) ("Significant authority holds that [the] constitutional right [to present evidence] occasionally overrides rules of exclusion.").

Legitimate policy concerns that animate "no-impeachment" rules are insufficient to displace the primacy of constitutional protections. The majority below reasoned that "'[p]rotecting the secrecy of jury deliberations'" invariably trumps "a defendant's opportunity to vindicate his fundamental constitutional right to an impartial jury untainted by the influence of racial bias." Pet. App. 27a (Márquez, J., dissenting). That holding is clearly wrong.

Courts should not apply "no-impeachment" rules "mechanistically to defeat the ends of justice." *Chambers v. Mississippi*, 410 U.S. 284, 302 (1973). With respect to the Sixth Amendment right to a fair trial by an unbiased jury in particular, this case demonstrates that "it would not be safe to lay down any inflexible rule" in the name of secrecy or finality, "because there might be instances in which [a juror's testimony] could not be excluded without violating the plainest principles of justice." *McDonald v. Pless*, 238 U.S. 264, 268-69 (1915) (quoting *United States v. Reid*,

53 U.S. (12 How.) 361, 366 (1851)) (internal quotations omitted).[12]

> [B]lanket rules either excluding all juror testimony of bias or admitting all such testimony are inappropriate. A balance must be struck, protecting parties from the most egregious cases of jury bias while leaving the jury free to decide most cases without fear of judicial intrusion. While lines may be difficult to draw in many cases, it should be clear that among the most serious cases of jury bias are those involving racial prejudice.

Wright & Gold, *supra*, § 6074 (footnotes omitted); *see also Perkins v. LeCureux*, 58 F.3d 214, 222 (6th Cir. 1995) (Jones, J., concurring) (quoting Wright & Gold), *cert. denied*, 516 U.S. 992 (1995). It would be particularly inappropriate to have a rule that bars the admissibility of evidence of racial bias because the underlying misconduct, if established, potentially constitutes a structural defect. The need for a complete inquiry into juror impartiality thus is heightened in cases involving racial bias. Conversely,

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[12] In other analogous contexts, members of this Court have recognized the desirability of having a post-conviction hearing "to determine whether a juror is biased." *Smith v. Phillips*, 455 U.S. 209, 221-22 (1940) (O'Connor, J., concurring). Blackstone went even further, stating that "[c]auses of suspending the judgment by granting a new trial" included both extra-record influences and "*any gross misbehaviour* of the jury among themselves " 3 Blackstone, *supra*, at *387 (emphasis added). Moreover, LDF has long maintained that, in some instances, racial prejudice will—in light of its substance and context—be egregious enough to raise a presumption of bias. *See e.g.*, Brief of the NAACP Legal Defense and Educational Fund, Inc. as *Amicus Curiae* in Support of Petitioner, *Sterling v. Dretke*, 117 Fed. App'x 328 (5th Cir.) (unpublished), *cert. denied*, 544 U.S. 1053 (2005), 2005 WL 952252 at *7 (Apr. 22, 2005).

the policy of promoting the finality of judgments is gravely undermined when the court is precluded from considering evidence tending to show that the underlying judgment may be void.

The Colorado Supreme Court's policy justifications for tolerating the extreme racial prejudice in this case are deeply flawed.

First, concerns about attorneys engaging in fishing expeditions cannot alone support an unbounded application of Rule 606(b), because jurors can and do volunteer information about racial bias in deliberations, as demonstrated by the case at hand. 27 Wright & Gold, *supra* § 6072; Edward T. Swaine, *Pre-Deliberations Juror Misconduct, Evidential Incompetence, and Juror Responsibility*, 98 Yale L.J. 187, 194 (1988) (noting the "evident willingness of jurors to volunteer information" and explaining Rule 606(b)'s exceptions arguably "permit[] good faith attempts to discover evidence relating to an 'outside influence'"). Recognizing "an exception for testimony pertaining to racist juror misconduct would not significantly impair rule 606(b)," yet "would promote universally accepted countervailing interests—the defendant's and society's interests in having a criminal justice system free of racial bias." *Racist Juror Misconduct During Deliberations*, 101 Harv. L. Rev. 1595, 1599 (1988).

The Colorado Supreme Court's other concerns about the harassment of jurors are also misplaced, since judges have many tools to control the conduct of lawyers and protect the jury from unwanted contact. *See e.g.*, Nicholas S. Bauman, *"Extraneous Prejudicial Information": Remedying Prejudicial Juror Statements Made During Deliberations*, 55 Ariz. L. Rev. 775, 798, 802 & nn.245-47 (2013) (describing other rules some jurisdictions have adopted to protect

jurors from harassment); Benjamin T. Huebner, *Beyond* Tanner*: An Alternative Framework for Postverdict Juror Testimony*, 81 N.Y.U. L. Rev. 1469, 1493-95 (2006) (noting that states place other limits on attorneys or their investigators contacting jurors after trial).

Second, while maintaining the secrecy of jury deliberations is certainly an important consideration, our judicial system rests ultimately on the fairness and impartiality of the process. "[T]he right to an impartial jury under the Sixth and Fourteenth Amendments," *Gray v. Mississippi*, 481 U.S. 648, 658 (1987), "goes to the very integrity of the legal system" *id.* at 668. Thus, it would be improper to blunt an explicit constitutional right because of a policy consideration that is implicitly rooted in common law rather than a competing—and overriding—constitutional mandate.

Third, the Colorado Supreme Court's decision seems to rest on the erroneous presumption that Sixth and Fourteenth Amendment rights no longer apply after the issuance of a jury verdict. Pet. App. 27a (Márquez, J., dissenting) (disagreeing with the majority's categorical suggestion that secrecy "must trump a defendant's opportunity to vindicate his fundamental constitutional right"). But claims under Sixth and Fourteenth Amendments are regularly litigated well beyond the exhaustion of direct appeals through post-conviction under the Anti-Terrorism and Effective Death Penalty Act. *See, e.g.*, *Foster*, 136 S. Ct. 1737 (Fourteenth Amendment claim brought thirty years after verdict); *Berghuis v. Smith*, 559 U.S. 314 (2010) (certiorari granted regarding Sixth Amendment claim ten years after verdict); *see also Duren v. Missouri*, 439 U.S. 357 (1979) (overturning conviction based on Sixth

Amendment claim two years after Missouri Supreme Court upheld verdict).

Fourth, the Colorado Supreme Court erroneously assumed that a policy of relying upon voir dire alone could root out racial bias in jury deliberations, *see* Pet. Br. 24-27, because jurors are unlikely to publicly admit to their own racial prejudices, Pet. 23-24, and jurors' unconscious biases may later manifest as explicit biases during deliberations.[13] *See also* Pet. Br. 21 ("None of the *Tanner* safeguards adequately protects defendants when a juror infects deliberations with racially biased assertions.").

On balance, courts are readily equipped to deal with extreme and extraordinary instances of juror bias, as in this case, and should not ignore an accused's constitutional right to an impartial jury due to nebulous policy concerns. *See* Pet. Br. 29-31, 38; (listing twenty jurisdictions that already allow courts to consider juror testimony that racial bias infected deliberations); *see generally* Amicus Br. of Retired Judges. Likewise, judges are certainly capable of addressing jury secrecy concerns by focusing any inquiries into jury misconduct on the prejudicial misconduct at hand.

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[13] *See, e.g.*, Mark W Bennett, *Unraveling the Gordian Knot of Implicit Bias in Jury Selection: The Problems of Judge-Dominated Voir Dire, the Failed Promise of Batson, and Proposed Solutions*, 4 Harv. L. & Pol'y Rev. 149, 152 (2010) ("Implicit biases are unstated and unrecognized and operate outside of conscious awareness. Social scientists refer to them as hidden, cognitive, or automatic biases, but they are nonetheless pervasive and powerful."); Pet. 23 (discussing observations of federal judge on unconscious bias).

II. EXCLUDING EXPLICIT EVIDENCE OF RACIAL DISCRIMINATION IN JURIES WOULD SERIOUSLY UNDERMINE PUBLIC CONFIDENCE IN THE CRIMINAL JUSTICE SYSTEM.

The jury exists, in part, to instill public confidence in our legal system. Almost two centuries ago, Alexis de Tocqueville observed that the jury "imbues all classes with a respect for the thing judged, and with the notion of right." Tocqueville, *supra*, at 112. This Court, too, has long recognized that "[t]he purpose of the jury system is to impress upon the criminal defendant and the community as a whole that a verdict of conviction or acquittal is given in accordance with the law by persons who are fair." *Powers*, 499 U.S. at 413. Respect for the verdicts of our courts is, in part, responsible for ensuring the "continued acceptance of the laws by all of the people." *Id.*; *see also Edmonson*, 500 U.S. at 624 ("[T]he jury system performs the critical governmental functions of guarding the rights of litigants and ensuring continued acceptance of the laws by all of the people.") (quoting *Powers*, 499 U.S. at 407) (internal quotation marks omitted); *Williams v. Pennsylvania*, 579 U.S. __, No. 15-5040, 2016 WL 3189529 (U.S. June 9, 2016). That public confidence is undermined by jury verdicts tainted by the type of explicit racial prejudice evidenced in this case.

Moreover, this Court has emphasized that "[t]he need for public confidence is especially high in cases involving race related crimes," where, as in the case at hand, "emotions in the affected community will inevitably be heated and volatile." *McCollum*, 505 U.S. at 49. The heightened concern about public confidence in racially charged cases stems from the troubling history of all-white juries and anti-Black persecution, *supra* Part I.A. It also reflects this

Court's special solicitude for combating racial bias in the administration of justice, *supra* Part I.

A. Racial Prejudice in the Jury System Damages Individual Proceedings, Community Perceptions, and Democratic Principles.

The damage caused by racial bias in the jury system is "not limited to the defendant—there is injury to the jury system, to the law as an institution, to the community at large, and to the democratic ideal reflected in the processes of our courts." *Ballard v. United States*, 329 U.S 187, 195 (1946). Each of these harms supports reversal of the decision below.

First, racial prejudice within the jury system "create[s] the appearance of bias in the decision of individual cases, and increase[s] the risk of actual bias as well." *Peters v. Kiff*, 407 U.S. 493, 503 (1972). *See also Powers*, 499 U.S. at 411 ("[R]acial discrimination in the selection of jurors places the fairness of a criminal proceeding in doubt."); *Edmonson*, 500 U.S. at 628 (same).

Second, the harm caused by racial bias in the jury system "extends beyond that inflicted on the defendant and the excluded juror to touch the entire community." *Batson*, 476 U.S. at 87 *See also J.E.B.*, 511 U.S. at 140 ("The community is harmed by the State's participation in the perpetuation of invidious group stereotypes."); *Rose*, 443 U.S. at 556 ("The harm is not only to the accused It is [also] to society as a whole."); *McCollum*, 505 U.S. at 49-51 (arguing that bias in the jury system "undermine[s] the very foundation of our system of justice—our citizens' confidence in it."). The extent to which justice is *achieved* in a particular case or for a particular class (e.g., people of color charged with crimes) directly

shapes how the community *perceives* the criminal justice system. *See, e.g.*, *J.E.B.*, 511 U.S. at 140 (claiming that unredressed juror prejudice "invites cynicism respecting the jury's neutrality and its obligation to adhere to the law"); *Rose*, 443 U.S. at 555-556 ("Discrimination on the basis of race casts doubt on the integrity of the judicial process [and] impairs the confidence of the public in the administration of justice.").

Third, a jury verdict tainted by racial prejudice "not only violates our constitution and the laws enacted under it but is [also] at war with our basic concepts of a democratic society and a representative government." *Rose*, 443 U.S. at 564 (quoting *Smith v. Texas*, 311 U.S. 128, 130 (1940)). *See also Ballard*, 329 U.S. at 195 (recounting injury "to the democratic ideal reflected in the processes of our courts"). As Justice Thurgood Marshall explained:

> [I]nstitutions [of criminal justice] serve to exemplify, by the manner in which they operate, our fundamental notions of fairness and our central faith in democratic norms. They reflect what we demand of ourselves as a Nation committed to fairness and equality in the enforcement of the law That is why discrimination "is especially pernicious in the administration of justice," why its effects constitute an injury "to the law as an institution," why its presence must be eradicated root and branch by the most effective means available.

Hobby v. United States, 468 U.S. 339, 352 (1984) (Marshall, J., dissenting) (citations omitted).

B. A Court's Refusal to Consider Whether a Verdict is Tainted by Racial Prejudice Erodes Public Confidence.

The decision below failed to address the distinct ways in which racial prejudice in jury deliberations undermines public confidence in the criminal justice system. The majority below instead focused solely on the "potential" that investigation into claims of racial bias in juries "would shatter public confidence in the fundamental notion of trial by jury." Pet. App. 13a.

But disregarding evidence of overt racial or ethnic bias has "precisely the opposite effect." Pet. App. 18a (Márquez, J., dissenting). The majority below "ignores the demoralizing effect on public confidence caused by reports that jurors are racist, but [that] evidence of their racism is not admissible to overturn their verdicts." *Racist Juror Misconduct During Deliberations*, 101 Harv. L. Rev. at 1600 (footnote omitted).[14] This Court rejected a similar argument in *Aldridge v. United States*, where it was asserted "that it would be detrimental to the administration of the law to allow questions to jurors as to racial or religious prejudices." 283 U.S. 308, 314-15 (1931). There, the Court explained that "it would be far more injurious to permit it to be thought that persons entertaining a disqualifying prejudice were allowed to serve as jurors and that inquiries designed to elicit the fact of disqualification were barred," *id.* at 315, and that there would be "[n]o surer way to bring the processes of justice into disrepute," *id.*, than to

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[14] Moreover, in other contexts, this Court has recognized the "principle that justice cannot survive behind walls of silence [that] has long been reflected in the 'Anglo-American distrust for secret trials.'" *Sheppard v. Maxwell*, 384 U.S. 333, 349-50 (1966).

insulate racial bias from judicial scrutiny or redress. The same conclusion is dictated here.

Without appropriate redress, the racial stereotypes and smears that infected the jury verdict in this case not only render Mr. Peña-Rodriguez's case fundamentally unfair, they also significantly impair public confidence in our system of justice. Less than 45 percent of all Americans believe that racial groups are treated equally in the criminal justice system. Those numbers plummet further among racial minorities, into the low teens for African Americans,[15] and have remained stagnant for over two decades.[16]

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[15] *See, e.g.*, *CNN/ORC Poll of December 22, 2014* at 6, http://i2.cdn.turner.com/cnn/2014/images/12/22/cnn.poll.12.22.pdf (only 41 percent of the American population thinks that the criminal justice system treats all groups equally; 50 percent of whites and 21 percent of non-whites); *Reason-Rupe Public Opinion Survey, October 2014 National Telephone Survey*, Reason-Rupe, http://reason.com/assets/db/1412808480505.xlsx (Oct. 9, 2014) (45 percent of the American population thinks that the criminal justice system treats all groups equally; 14 percent of African-Americans, 32 percent of Hispanics, and 53 percent of white respondents); Robert P Jones, Daniel Cox & Juhem Navarro-Rivera, *Economic Insecurity, Rising Inequality, and Doubts about the Future: Findings from the 2014 American Values Survey*, 38 (Pub. Religion Research Inst. Sept. 23, 2014), http://publicreligion.org/site/wp-content/uploads/2014/11/PRRI-AVS-with-Transparancy-Edits.pdf (44 percent of all Americans think that blacks and other minorities receive equal treatment as whites in the criminal justice system; 16 percent of African-Americans, 40 percent of Hispanics, and 49 percent of white respondents).

[16] *Compare* George Gallup, Jr., *The Gallup Poll: Public Opinion* 51 (1996) (68 percent of African-American respondents felt that the American justice system was biased against African-Americans), *with King's Dream Remains an Elusive Goal; Many Americans See Racial Disparities* 12, Pew Research Ctr. (Aug. 22,

This perception of racial unfairness in the administration of criminal justice is reinforced by cases of explicit racial epithets and stereotypes being used to justify convictions and sentences.[17]

A decision from this Court affirming the decision below would send an ominous signal that the American judiciary is, at best, indifferent to racial bias in jury verdicts. At worst, this Court would be seen as condoning the juror's abhorrent statements and blessing a "guilty" verdict it knows to be tainted. Mere disapproval of the juror's statements is not enough; this Court must affirm that the judiciary will take corrective action to ensure that verdicts are rendered based on facts, not racial biases.

2013), http://www.pewsocialtrends.org/2013/08/22/kings-dream-remains-an-elusive-goal-many-americans-see-racial-disparities/ (same).

[17] *See also, e.g.*, *Kittle v. United States*, 65 A.3d 1144, 1147-48 (D.C. 2013) ("[A]ll 'blacks' are guilty regardless."); *United States v. Shalhout*, 507 F App'x 201, 203 (3d Cir. 2012) ("[T]he defendants [were] guilty because they were of Arabic descent."); *United States v. Villar*, 586 F.3d 76, 81, 85-87 (1st Cir. 2009) ("I guess we're profiling but they [Hispanics] cause all the trouble."); *United States v. Benally*, 546 F.3d 1230, 1231 (10th Cir. 2008) ("'[W]hen Indians get alcohol, they all get drunk,' and when they get drunk, they get violent."); *United States v. Henley*, 238 F.3d 1111, 1113 (9th Cir. 2001) ("All the niggers should hang."); *Shillcutt v. Gagnon*, 827 F.2d 1155, 1156 (7th Cir. 1987) ("Let's be logical. He's black and he sees a seventeen year old white girl – I know the type."); *United States v. Heller*, 785 F.2d 1524, 1526 (11th Cir. 1986) (juror "admitted making an anti-Semitic 'slur'" and jokes during trial of Jewish defendant). *See also Smith v. Brewer*, 444 F Supp. 482, 485 (S.D. Iowa 1978) (juror strutted around the jury room imitating a black minstrel), *aff'd*, 577 F.2d 466 (8th Cir.), *cert. denied*, 439 U.S. 967 (1978); *Commonwealth v. Laguer*, 571 N.E.2d 371, 375 (Mass. 1991) (stating, in an aggravated rape trial, that "spics screw all day and night").

This Court has expressed particular concern for the public's "impression that the judicial system has acquiesced" to certain forms of discrimination "or that the 'deck has been stacked' in favor of one side." *J.E.B.*, 511 U.S. at 140. Furthermore, this Court has recognized that allowing "[a]ctive discrimination" involving juries "condones violation of the United States Constitution within the very institution entrusted with its enforcement, and so invites cynicism respecting the jury's neutrality and its obligation to adhere to the law." *Powers*, 499 U.S. at 412. This troubling result is further enhanced when the discrimination at issue, as in this case, takes place in the official forum of a court. *See, e.g.*, *McCollum*, 505 U.S. at 53 ("[T]he courtroom setting intensifies the harmful effects of the discriminatory act."); *Edmonson*, 500 U.S. at 628 ("[T]he injury caused by the discrimination is made more severe because the government permits it to occur within the courthouse itself."). This sort of "[r]acial prejudice converts the jury itself [from a safeguard] into an instrument of oppression." Wright & Gold, *supra*, § 6074.

CONCLUSION

For over a century, this Court has strived to combat racial discrimination in the jury system. Relying on these precedents, the nation has made significant steps towards the constitutional goal of equality for all. Although more work remains to be done, this Court's commitment to racial fairness in criminal justice promotes trust in the rule of law, particularly for the communities of color that *amici* serve.

Unbridled racial prejudice, like that which infected the jury in Mr. Peña-Rodriguez's case, fundamentally undermines the integrity of our justice system and cannot be tolerated by our Constitution. "If our society

is to continue to progress as a multiracial democracy, it must recognize that the automatic invocation of race stereotypes retards that progress and causes continued hurt and injury." *Edmonson*, 500 U.S. at 630-31. Neither precedent nor prudence support Colorado's strained stance to the contrary. This Court should not condone that position, and it should reverse.

Respectfully submitted,

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Supreme Court of the United States

MIGUEL ANGEL PEÑA RODRIGUEZ,
Petitioner,

v.

STATE OF COLORADO,
Respondent.

On Writ of Certiorari to the Colorado Supreme Court

BRIEF OF NATIONAL ASSOCIATION OF FEDERAL DEFENDERS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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Timothy C. Rank, *Federal Rule of Evidence 606(b) and the Post-Trial Reformation of Civil Jury Verdicts*, 76 Minn. L. Rev. 1421 (1992) 9

8 *Wigmore on Evidence* § 2352 (John T. McNaughton ed. 1961) 6, 8

STATEMENT OF INTEREST[1]

The National Association of Federal Defenders ("NAFD") was formed in 1995 to enhance the representation provided to indigent criminal defendants under the Criminal Justice Act, 18 U.S.C. § 3006A, and the Sixth Amendment to the Constitution. NAFD is a nationwide, non-profit, volunteer organization. Its membership is comprised of attorneys who work for federal public and community defender organizations authorized under the Criminal Justice Act. One of the guiding principles of NAFD is to promote the fair administration of justice by appearing as *amicus curiae* in litigation relating to criminal law issues, particularly as those issues affect indigent defendants in federal court. NAFD has appeared as *amicus curiae* in litigation before the Supreme Court and the federal courts of appeals.

NAFD is particularly interested in this case because the holding that jurors cannot testify about racial bias in jury deliberations runs afoul of criminal defendants' constitutional rights, and also prevents criminal defense attorneys from ensuring that their clients receive a fair trial in front of an impartial jury.

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amicus* certifies that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus* made such a monetary contribution. Both parties have filed blanket letters of consent to the filing of *amicus* briefs with the Clerk's office.

SUMMARY OF ARGUMENT

1. A core premise of Respondent's argument is that judicial inquiry into juror misconduct is foreign to our legal system. The reality, however, is far more nuanced. Courts in the United States have long permitted jurors to testify to impeach their verdicts in certain circumstances, with the aim of ensuring fairness and justice in jury trials. Before 1785, common law allowed jurors to impeach their verdicts through testimony and affidavits regarding deliberations. While Lord Mansfield advanced a rule prohibiting juror testimony to impeach verdicts in *Vaise v. Delaval*, 99 Eng. Rep. 944 (K.B. 1785), American courts adopted the rule with significant exceptions, recognizing the injustices and evidentiary anomalies created by a strict application of the rule.

To be sure, American courts have disagreed about the precise circumstances in which juror testimony should be permitted to impeach a verdict. Many of them adopted one of two competing approaches at the common law: (1) the "Iowa" approach, which permitted all juror testimony about deliberations unless it went to the juror's subjective intentions and internal thought processes; or (2) the "federal" approach, which permitted courts to consider juror testimony that an "extraneous matter" had influenced the jury while prohibiting other juror testimony about deliberations. But, while courts disagreed on the precise contours of permissible jury testimony, they overwhelmingly agreed that such testimony was necessary in some cases to ensure a fair trial.

The federal government and states subsequently codified rules about juror testimony. As originally enacted as part of the codification of the Federal Rules of Evidence in 1975, Rule 606(b) permitted jurors to testify about whether the jury was subject to improper outside influence or extraneous prejudicial information. Several states, including Colorado, have adopted rules similar to Rule 606(b), although a number of other states have continued to follow the "Iowa" approach.

Even after Rule 606(b)'s enactment, however, federal courts and state courts subject to Rule 606(b) analogs have allowed juror testimony to impeach verdicts in circumstances beyond those listed in the rule. One such circumstance – testimony regarding whether the verdict was accurately rendered – was formally incorporated into Rule 606(b) in 2006. Still, courts permit jurors to provide information about verdicts or deliberations in other circumstances that go beyond the current Rule. Most notably for this case, numerous courts have permitted juror testimony about racial bias in jury deliberations, recognizing due process and Sixth Amendment concerns with barring such testimony.

2. With more than two hundred years of practice under their belts, courts are adept at dealing with allegations (whether by jurors or others) of juror misconduct, and have developed methodical, multi-step processes for assessing whether a verdict should be impeached based on allegations of juror misconduct.

First, courts require the party alleging juror

misconduct to make a threshold showing that the allegation is colorable. Second, if the party advances a colorable allegation, the judge conducts an evidentiary hearing to gather more evidence and assess its credibility. This inquiry often requires the court to determine whether juror testimony is admissible under Rule 606(b) or on another basis. Third, the court conducts a prejudice inquiry, for courts allow juror testimony to impeach a verdict only when a party actually is prejudiced. The prejudice inquiry is searching and comprehensive, accounting for factors such as the extent to which the improper communication or extraneous information was discussed by the jury, the strength of the government's case, and whether extraneous information was cumulative of evidence properly before the jury.

Courts regularly and carefully execute this multi-step process, advancing the party's interest in a fair trial while also giving heed to the systemic interests in conserving judicial resources and respecting the finality of verdicts.

3. Allowing jurors to testify about racial bias in jury deliberations fits well within both tradition and existing practice. As a constitutional matter, a hallmark of the right to a fair trial is the right to an impartial jury that decides the case based solely on the evidence before it. Racial prejudice in jury deliberations strikes at the core of this right, and preventing racial bias in jury deliberations thus is at least as important to a defendant's fair trial rights as shielding these deliberations from outside influences and extraneous

information.

Moreover, as a practical matter, courts are well-equipped to apply the same methodical approach they routinely apply under Rule 606(b) to address allegations of racial bias. Courts thus have ample tools to assess the credibility of allegations of racial bias, consider evidentiary issues, and determine whether there has been prejudice. Courts that have already made a practice of admitting juror testimony regarding racial bias have demonstrated that they are adept at making these determinations in this context, even in difficult cases. If more courts were to consider juror testimony of racial bias, they undoubtedly would be amply prepared to take up the task.

ARGUMENT

I. THERE IS A LONG AND SIGNIFICANT HISTORY OF ALLOWING JURORS TO PROVIDE INFORMATION ABOUT THEIR DELIBERATIONS TO ENSURE A FAIR TRIAL.

A key premise of the decision below and of Respondent's argument to this Court is that courts have long been "preclude[d] ... from peering beyond the veil that shrouds jury deliberations." BIO at 1 (quoting Pet. App. 6a). But the reality of both historical and current practice is far more complex. For centuries, to ensure a fair trial, courts have recognized substantial exceptions to the general presumption that juror deliberations are confidential.

While Rule 606(b) now codifies certain instances in which juror testimony is permitted in federal courts (and Colorado and certain other states have adopted similar rules), these courts have continued to allow juror testimony in circumstances that go beyond those expressly authorized by the Rule when they conclude that the Constitution or justice so requires. Most relevant to this case, courts have recognized that Rule 606(b) and its state law analogs cannot foreclose a defendant's ability to show through juror testimony that the jury's deliberations were infected by racial bias, as this would violate the defendant's constitutional right to a fair trial.

A. At Common Law, Courts Permitted Juror Testimony To Impeach Verdicts.

Prior to 1785, the common law permitted jurors to impeach their verdicts through testimony and affidavits. *See McDonald v. Pless*, 238 U.S. 264, 267-68 (1915); *State v. Kociolek*, 118 A.2d 812, 815 (N.J. 1955) (Brennan, J.); *see also* 8 *Wigmore on Evidence* § 2352, at 696-97 (John T. McNaughton ed. 1961) (compiling cases). Commentators trace the origin of Rule 606(b) to *Vaise v. Delaval*, 99 Eng. Rep. 944 (K.B. 1785), in which Lord Mansfield declined to receive the affidavit of two jurors to prove their verdict had been made by lot. *See Warger v. Shauers*, 135 S. Ct. 521, 526 (2014). Lord Mansfield ruled that "[t]he Court cannot ... receive such an affidavit from any of the jurymen themselves, in all of whom such conduct is a very high misdemeanor ... but in every such case the Court must derive their

knowledge from some other source[,] such as from some person having seen the transaction through a window, or by some such other means." *Vaise*, 99 Eng. Rep. 944. Lord Mansfield's rule soon took root in the United States. *Warger*, 135 S. Ct. at 526.

Today, however, "[t]he familiar rubric that a juror may not impeach his own verdict, dating from Lord Mansfield's time, is a gross oversimplification." Fed. R. Evid. 606(b) Advisory Committee's Note to 1972 Proposed Rules. By the beginning of the nineteenth century, courts in the United States had started to recognize exceptions to Lord Mansfield's rule. *See, e.g.*, *Grinnell v. Phillips*, 1 Mass. 530, 542 (1805) (Sewall, J., concurring) ("[T]he testimony of a juror may be admitted as to overt acts, which may be the subject of legal inquiry, and in that each member of the jury may be a competent witness."); *Smith v. Cheetham*, 3 Cai. R. 57, 60 (N.Y. Sup. Ct. 1805) (holding that it was proper to admit juror affidavits showing jurors issued quotient verdict and criticizing "Lord Mansfield's rule of shutting the mouths of the jurors"); *State v. Hascall*, 6 N.H. 352, 361 (1833) ("To exclude the testimony of jurors . . . in all questions affecting their verdict, would neither be just to the parties, or the jury."); *Murdock v. Sumner*, 39 Mass. (22 Pick.) 156, 157 (1839) ("The Court are not prepared to say that [the Mansfield Rule] is a rule without exception; there may be cases of manifest mistake in computation, or other obvious error, where there are full means of detecting and correcting it, where it would be proper to interfere."). Courts also criticized Lord Mansfield's rule for creating injustices and evidentiary issues, noting, for example, that it "permitted a bailiff or other court officer who had been

spying on the jury to testify as to misconduct, but disallowed the testimony of those who really knew what happened." *Kociolek*, 118 A.2d at 815 (Brennan, J.) (discussing history of Lord Mansfield's rule); *see also Crawford v. State*, 10 Tenn. 60, 67 (1821) ("Lord Mansfield says, the court must derive their knowledge from other sources. What source? The law contemplates their seclusion; the only alternative is the ignominious eavesdropper."); *Smith*, 3 Cai. R. at 59 ("If a man will voluntarily charge himself with a misdemeanor, why should he not be indulged?").

Accordingly, most courts in the United States applied Lord Mansfield's rule in a modified form that allowed juror testimony in some circumstances. *See* 3 Christopher B. Mueller & Laird C. Kirkpatrick, *Federal Evidence* § 6:16, Westlaw (4th ed. database updated May 2016) (noting that American courts applied a "somewhat compromised version of the more encompassing English rule" announced by Lord Mansfield). Two competing approaches developed in the courts. The first was derived from the Iowa Supreme Court's decision in *Wright v. Illinois & Mississippi Telegraph Co.*, 20 Iowa 195 (1866), which held that courts could receive post-verdict juror affidavits unless they related to matters that "inhere[d] in the verdict" – the juror's subjective intentions and thought processes in reaching the verdict. *Wright*, 20 Iowa at 210-11. About a dozen jurisdictions adopted this "Iowa" approach. 8 *Wigmore on Evidence* § 2354, at 702 & n.1. Other courts adopted what is referred to as the "federal" approach, which allowed jurors to present testimony that an "extraneous matter" had influenced the jury, but prohibited other juror testimony. *See*

Warger, 135 S. Ct. at 526. Unlike the Iowa approach, the federal approach focused on an "external/internal distinction to identify those instances in which juror testimony impeaching a verdict would be admissible." *Tanner v. United States*, 483 U.S. 107, 117-18 (1987).

This Court first held post-verdict juror testimony admissible in *Mattox v. United States*, 146 U.S. 140 (1892), allowing jurors' testimony that they had heard and read prejudicial information not admitted into evidence from a bailiff and an outside newspaper. *Id.* at 149. As this Court recently noted, its early cases could be read to suggest a preference for the Iowa approach. *See Warger*, 135 S. Ct. at 526; *see also Hayes v. United States*, 225 U.S. 347, 383-84 (1912) (stating that "we think the rule expressed in *Wright v. Illinois & M. Tel. Co.*, 20 Iowa 195 [1866] . . . should apply"); *Mattox*, 146 U.S. at 148-49 (quoting at length from Kansas Supreme Court case applying the Iowa approach). This Court ultimately retreated from that approach in *McDonald v. Pless*, 238 U.S. 264 (1915), however, holding that juror affidavits were not admissible to show that jurors had issued a "quotient" verdict (*i.e.*, a monetary award calculated by dividing the sum of the individual jurors' suggested amounts by twelve). *Id.* at 265. But many states continued to follow the Iowa approach, *see* Timothy C. Rank, *Federal Rule of Evidence 606(b) and the Post-Trial Reformation of Civil Jury Verdicts*, 76 Minn. L. Rev. 1421, 1428 & n.39 (1992) – and several still do so today. *See, e.g.*, Cal. Evid. Code § 1150(a); Fla. Stat. § 90.607(2)(b); Conn. Super. Ct. R. § 16-34; Haw. R. Evid. 606(b).

B. Congress Codified In Rule 606(b) The Well-Established Practice of Allowing Juror Testimony To Impeach A Verdict In Some Circumstances.

In enacting Rule 606(b) as part of the broader codification of the Federal Rules of Evidence in 1975, Congress sought to codify the well-established practice of allowing juror testimony to impeach a verdict in some circumstances. *See* Fed. R. Evid. 606(b) Advisory Committee's Note to 1972 Proposed Rules. Indeed, the Federal Rules Advisory Committee observed that "simply putting verdicts beyond reach can only promote irregularity and injustice." *See id.* At the same time, the Advisory Committee acknowledged that courts had "substantial differences of opinion" regarding the circumstances in which testimony, affidavits, or statements of jurors should be received for the purpose of invalidating a verdict or indictment. *Id.* The debate surrounding Rule 606(b) thus centered upon the particular circumstances in which jurors would be permitted to offer such testimony. *See Tanner*, 483 U.S. at 139.

The Advisory Committee initially proposed a version of Rule 606(b) resembling the Iowa approach, which would have admitted juror testimony to impeach a verdict, except when it pertained to a juror's "emotions" and "mental processes." Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, Revised Draft of Proposed Rules of Evidence for the United States Courts and Magistrates, 51 F.R.D. 315, 387 (1971). Senator John McClellan and the Department of Justice

criticized the Advisory Committee's proposed rule on the grounds that it would too broadly authorize the use of juror testimony to impeach verdicts. *See Tanner*, 483 U.S. at 122 (discussing legislative history). Congress ultimately adopted a more restrictive version of the rule reflecting the federal approach. *See Warger*, 135 S. Ct. at 527.

As originally enacted in 1975, Rule 606(b) stated:

> Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon his or any other juror's mind or emotions as influencing him to assent to or dissent from the verdict or indictment or concerning his mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror . . . .

Fed. R. Evid. 606(b) (1975). Thus, the rule as enacted permitted jurors to testify about improper outside influences or extraneous prejudicial information. *Id.*

These are not the only circumstances in which courts subject to Rule 606(b) have permitted jurors to testify, however. Rather, even after Rule 606(b) was codified, courts continued to create new exceptions to further the administration of justice. One such exception allowed juror testimony to determine whether the verdict had been accurately rendered.

Following the enactment of Rule 606(b), a number of federal circuit courts held that jurors may testify about the accuracy of the verdict because such testimony is necessary to ensure a fair outcome for litigants, even though this was not listed as a circumstance in which jurors could testify under Rule 606(b). *See, e.g., Plummer v. Springfield Terminal Ry. Co.*, 5 F.3d 1, 3 (1st Cir. 1993); *Robles v. Exxon Corp.*, 862 F.2d 1201, 1208 (5th Cir. 1989); *Karl v. Burlington N. R.R.*, 880 F.2d 68, 74 (8th Cir. 1989); *Eastridge Dev. Co. v. Halpert Assoc., Inc.*, 853 F.2d 772, 783 (10th Cir. 1988); *Attridge v. Cencorp Div. of Dover Techs. Int'l, Inc.*, 836 F.2d 113, 116 (2d Cir. 1987). Following these cases, this Court submitted to Congress an amendment to Rule 606(b) adding an additional exception for post-verdict juror testimony about whether "a mistake was made in entering the verdict on the verdict form." *See* Amendments To Federal Rules of Evidence, 547 U.S. 1281 (Apr. 12, 2006); *see also* Fed. R. Evid. 606(b) Advisory Committee's Notes to 2006 Amendments (noting that exception responded to "case law that has established an exception for proof of clerical errors"). The amendment took effect in 2006. Its history illustrates the ongoing role of the courts in determining the circumstances in which juror testimony will be permitted, as well as this Court's important role in guiding the development and scope of Rule 606(b) to balance the competing priorities of fairness and finality of verdicts.

C. Courts Have Recognized Additional Circumstances, Beyond Those Set Forth in Rule 606(b), In Which Information Can Be Obtained From Jurors About Their Verdicts And Deliberations.

Federal courts have continued to recognize a number of other circumstances in which jurors may provide information about their verdicts and deliberations. For example, Federal Rule of Criminal Procedure 31(d) states: "After a verdict is returned but before the jury is discharged, the court must on a party's request, or may on its own, poll the jurors individually." *See also United States v. Singer*, 345 F. Supp. 2d 230, 234 (D. Conn. 2004) (holding that Rule 606(b) does not apply to post-verdict juror polling under Fed. R. Crim. P. 31(d), and thus does not limit what information from jurors a judge may consider when polling the jury), *aff'd*, 241 F. App'x 727 (2d Cir. 2007); Fed. R. Evid. 606(b) Advisory Committee's Notes to 2006 Amendments (noting that Rule 606(b) does not prevent polling the jury). Moreover, even after the verdict is entered and the jury is discharged, it is "not uncommon" for attorneys or court staff to talk to jurors to seek their feedback on the trial. *Dietz v. Bouldin*, 136 S. Ct. 1885, 1894 (2016), citing 1 K. O'Malley *et al.*, Federal Jury Practice and Instructions § 9:8 (6th ed. 2006).

Especially relevant to this case, a number of federal and state courts allow jurors to testify about racial bias in deliberations. As this Court recognized more than a century ago, "it would not be safe to lay down any

inflexible rule [regarding the exclusion of juror testimony,] because there might be instances in which such testimony of the juror could not be excluded without violating the plainest principles of justice." *McDonald*, 238 U.S. at 268-69 (internal quotation marks omitted); *see also Warger*, 135 S. Ct. at 529 n.3 ("There may be cases of juror bias so extreme that, almost by definition, the jury trial right has been abridged."). Following this principle, a number of courts have held that precluding such testimony under Rule 606(b) would violate the constitutional guarantee of a fair trial.

In *United States v. Villar*, 586 F.3d 76 (1st Cir. 2009), for example, the First Circuit reversed the trial court's ruling that Rule 606(b) foreclosed it from considering a juror's testimony about racially biased remarks by another juror during deliberations. *Id.* at 87. As the First Circuit explained, "[w]hile the issue is difficult and close, we believe that the rule against juror impeachment cannot be applied so inflexibly as to bar juror testimony in those rare and grave cases where claims of racial or ethnic bias during jury deliberations implicate a defendant's right to due process and an impartial jury." *Id.* The Seventh Circuit similarly considered a juror's post-verdict affidavit alleging a racial slur by another juror, explaining that "[t]he rule of juror incompetency cannot be applied in such an unfair manner as to deny due process." *Shillcutt v. Gagnon*, 827 F.2d 1155, 1159 (7th Cir. 1987) (denying defendant's petition for writ of habeas corpus because there was insufficient evidence that racial slur, if it occurred, prejudiced defendant). A number of other federal and state courts similarly have

held that Rule 606(b) cannot be applied rigidly in cases where doing so would violate a defendant's Sixth Amendment rights. *See, e.g.*, *Villar*, 586 F.3d at 85-86 (compiling cases); *Developments in the Law – Race and the Criminal Process: Racist Juror Misconduct During Deliberations*, 101 Harv. L. Rev. 1595 (1988) (same).

II. COURTS HAVE AMPLE TOOLS AND METHODS TO ASSESS ALLEGATIONS OF JUROR BIAS FAIRLY AND EFFICIENTLY.

While the precise methods vary from jurisdiction to jurisdiction, courts have developed tools and practices to evaluate post-verdict allegations of juror misconduct.

1. Once an allegation of juror misconduct arises, the first step is for the judge to consider whether he or she should further investigate the allegation. Courts accordingly require a preliminary showing that the allegation is colorable. *See Economou v. Little*, 850 F. Supp. 849, 852-53 (N.D. Cal. 1994) ("Most federal courts deny requests to conduct post-verdict interviews of jurors unless there is a proper preliminary showing of likely jury misconduct or witness incompetency."); *United States v. Alexander*, 782 F.3d 1251, 1258 (11th Cir. 2015) (no hearing or further investigation of juror misconduct necessary absent "colorable showing of extrinsic influence" (quotation marks omitted)); *United States v. Gravely*, 840 F.2d 1156, 1159 (4th Cir. 1988) (request for leave to conduct post-verdict juror interviews properly denied because there was "no threshold showing of improper outside influence"). If

the claim is not colorable, the inquiry is at an end. *See, e.g., Traver v. Meshriy*, 627 F.2d 934, 941 (9th Cir. 1980) (denying defendant's request for hearing regarding allegation that jury verdict was not unanimous, where jurors had assented to verdict in poll in open court); *Economou*, 850 F. Supp. at 852-53 (denying leave to interview jurors where "defendants have not made any preliminary showing" of either "extraneous prejudicial information . . . improperly brought to the jury's attention" or "any outside influence improperly brought to bear upon any juror"); *Gravely*, 840 F.2d at 1159 (denying defendant's request to interview jurors based on juror's comment to press that jurors were under "extreme pressure at the end of a two week trial" because there was no "threshold showing of improper outside influence" and "[t]he alleged pressure could have been brought by one juror on another" (internal quotation marks omitted)); *cf. United States v. Basham*, 561 F.3d 302, 317 (4th Cir. 2009) (conducting evidentiary hearing after learning that juror contacted news producer at television station during trial to discuss trial); *United States v. Blumeyer*, 62 F.3d 1013, 1015 (8th Cir. 1995) (granting request for leave to interview jurors when faced with credible allegation that juror consulted outside lawyer).

In assessing whether a party has made this preliminary showing, courts are mindful of the balance between the party's interest in a fair trial, a juror's interest in avoiding harassment, and the systemic interest in the finality of verdicts. *See Munafo v. Metro. Transp. Auth.*, 277 F. Supp. 2d 163, 170 (E.D.N.Y. 2003), *aff'd*, 381 F.3d 99 (2d Cir. 2004). In keeping this balance, courts are wary of giving weight

to *ex parte* juror affidavits, *see, e.g.*, *Munafo*, 277 F. Supp. 2d at 174; *Continental Casualty Co. v. Howard*, 775 F.2d 876, 886 (7th Cir. 1985), and reluctant to allow parties to interview jurors for the purpose of uncovering juror impropriety when the court has no basis to believe there has been misconduct. *See, e.g.*, *United States v. Cornelius*, 696 F.3d 1307, 1324 (10th Cir. 2012); *United States v. Davila*, 704 F.2d 749, 754-55 (5th Cir. 1983); *Economou*, 850 F. Supp. at 853.

2. When a party advances a colorable claim of juror misconduct, the judge conducts an evidentiary hearing to assess the credibility of the evidence, permitting juror testimony to the extent appropriate, provided the evidence is admissible. *See, e.g.*, *Blumeyer*, 62 F.3d at 1015; *Haugh v. Jones & Laughlin Steel Corp.*, 949 F.2d 914, 917 (7th Cir. 1991). When the allegation of misconduct involves an unauthorized communication between a juror and a third party, judges initially "limit the questions asked [to] jurors to whether the [alleged] communication was made . . . and what exactly it said." *Haugh*, 949 F.2d at 917.

3. Juror misconduct only serves to impeach the verdict if it is prejudicial. Accordingly, if the judge finds there has been juror misconduct, the judge next assesses whether the misconduct was prejudicial. Courts conduct this inquiry with rigor and care. Cases involving a juror's unauthorized communication with a third party are illustrative. In 1954, this Court held that "any private communication, contact, or tampering directly or indirectly, with a juror during a trial about the matter pending before the jury is . . . deemed presumptively prejudicial." *Remmer v. United States*,

347 U.S. 227, 229 (1954). But the modern practice is not to treat the *Remmer* presumption as "particularly forceful" in light of Rule 606(b) and this Court's later jurisprudence. *United States v. Williams-Davis*, 90 F.3d 490, 496-97 (D.C. Cir. 1996). Instead courts "focus[] on specific facts of the alleged contact" recognizing that trial courts have "broad discretion . . . to assess the effect of the alleged intrusions." *Id.* at 496-97; *United States v. Lloyd*, 269 F.3d 228, 238-39 (3d Cir. 2001) (applying *Remmer* presumption only "when the extraneous information is of a considerably serious nature"); *Stockton v. Virginia*, 852 F.2d 740, 745 (4th Cir. 1988) ("[W]hile a presumption of prejudice attaches to an impermissible communication, the presumption is not one to be casually invoked"); *United States v. Hall*, 85 F.3d 367, 371 (8th Cir. 1996) (only presuming prejudice if extrinsic evidence related to factual evidence – as opposed to legal issues – not developed at trial).

To determine whether particular juror misconduct was prejudicial – that is, whether there was a "reasonable possibility that the jury's verdict was influenced by an improper communication," *Basham*, 561 F.3d at 319 (quotation marks omitted) – courts assess numerous factors, including the duration of the improper communication or contact, the extent to which the communication was discussed and considered by the jury, the strength of the government's case, whether extraneous information was cumulative of evidence admitted at trial, and at what point in deliberations any extraneous evidence was introduced. *See id.* at 319-20 (deeming the prejudice inquiry a "heavy obligation" that "requires the court to examine

the entire picture, including the factual circumstances and the impact on the juror") (internal quotation marks omitted); *Stockton*, 852 F.2d at 747 (considering extent of exposure); *Lloyd*, 269 F.3d at 240-41 (considering timing of exposure, length of jury deliberations, and strength of government's case); *Williams-Davis*, 90 F.3d at 497 (considering nature of communication, length of contact, impact of the communication on other jurors, strength of government's case, and whether extraneous information was cumulative of evidence admitted at trial); *Hall*, 85 F.3d at 371 (noting that courts should consider manner in which extrinsic evidence was received by jury, whether it was discussed and considered extensively, and at what point during deliberations evidence was introduced, among other factors).

These cases, and others, illustrate the care courts take in conducting prejudice inquiries. In *Lloyd*, for example, a defendant was convicted of computer sabotage by planting a "time bomb" on his employer's computer, set to "detonate" after he was fired. 269 F.3d at 231. After the verdict, a juror reported to the court that, during the deliberation period, she heard a news report about a computer virus propagated by someone (not the defendant) with remote access to the infected computer. *Id.* The Third Circuit concluded that the juror's exposure to the story was not prejudicial because the jury did not discuss the story during deliberations, the juror was exposed to the story only after the jury had deliberated for two days, the government had advanced "strong uncontradicted evidence to support the verdict," and the news story

was not sufficiently related to the facts and theories of the case. *Id.* at 239-43.

In contrast, the court in *Williams-Davis* faced a more direct incident of outside influence: an allegation that the forewoman's husband advised her to "nail" the defendants. The court concluded there was no actual prejudice in light of the fact that the remark was isolated, the forewoman leaned heavily toward conviction during deliberations, and the evidence against the defendant was overwhelming. *Williams-Davis*, 90 F.3d at 497-98.

Lastly, *United States v. Elias*, 269 F.3d 1003 (9th Cir. 2001), reflects how courts are appropriately thorough when the situation calls for it. In *Elias*, the district court faced a factual dispute about whether the defendant asked a juror in the parking lot "what it would take" to win her vote. *Id.* at 1019-20. The district court conducted two "extensive" evidentiary hearings, taking testimony from all of the jurors, and ultimately credited the juror in the parking lot's testimony that the defendant briefly greeted the juror but did not make the concerning statement. *Id.* The district court also found – based on the testimony of two other jurors – that even if the concerning statement was made, it was made in a "joking manner" and was not prejudicial. *Id.* at 1020. The Ninth Circuit affirmed these factual findings as well as the district court's denial of the defendant's request for a new trial. *Id.* at 1020-21.

As these cases illustrate, courts capably employ a multi-step process to determine whether juror testimony or other evidence should be admitted and, if

so, whether a verdict should be impeached based on it. The process is structured such that courts need not expend significant time or resources on claims that are not colorable, but have the discretion to conduct a more searching inquiry when appropriate. The process also is structured to minimize juror harassment and respect the finality of verdicts by only affording relief – only impeaching the verdict – in the face of actual prejudice.

III. ALLOWING JURORS TO PROVIDE INFORMATION ABOUT RACIAL BIAS IN DELIBERATIONS FITS COMFORTABLY WITHIN TRADITION AND EXISTING PRACTICE.

The need to ensure that juries are not tainted by racial bias is at least as important, constitutionally speaking, as the need to ensure that juries are not tainted by the sorts of external influences covered by Rule 606(b). The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury." U.S. Const. amend. VI. Thus, "[o]ne touchstone of a fair trial" is the guarantee of an impartial jury that is "capable and willing to decide the case solely on the evidence before it." *McDonough Power Equip., Inc. v. Greenwood*, 464 U.S. 548, 554 (1984) (internal quotation marks omitted). "The obvious difficulty with prejudice in the judicial context is that it prevents the impartial decision-making that both the Sixth Amendment and fundamental fair play require." *Villar*, 586 F.3d at 84-85 (quoting *United States v. Heller*, 785 F.2d 1524, 1527

(11th Cir. 1986)). Accordingly, as this Court has emphasized, "[d]iscrimination on the basis of race, odious in all aspects, is especially pernicious in the administration of justice." *Rose v. Mitchell*, 443 U.S. 545, 555 (1979). It therefore would be anomalous to admit juror testimony of less pernicious extraneous information and outside influence, while barring juror testimony regarding the "especially pernicious" factor of racial bias.

Allowing juror testimony regarding racial bias in deliberations also fits comfortably within courts' existing practices and procedures. Broadly speaking, when courts are faced with any allegation of juror misconduct, they must determine whether the allegations are colorable, supported by sufficient evidence, and sufficiently prejudicial to justify impeaching the verdict. The same tools and practices courts use to assess other allegations of juror misconduct – including evidentiary and other hearings – work equally well for assessing allegations of racial bias in deliberations.

First, the court's threshold determination about whether an allegation is sufficiently colorable to warrant further evidentiary proceedings will – regardless of the subject matter at issue – take account of factors such as "the content of the allegations, the seriousness of the alleged misconduct or bias, and the credibility of the source." *Cornelius*, 696 F.3d at 1324 (quoting *United States v. Smith*, 424 F.3d 992, 1012 (9th Cir. 2005)).

Second, a court's determination about whether an allegation is supported by sufficient evidence will involve the same evidentiary analyses and tools, regardless of whether the allegation involves racial bias or another type of juror misconduct. When the evidence includes juror testimony, the court must of course make the key determination as to whether that testimony is admissible under Rule 606(b) or another source. And to make this determination in the Rule 606(b) context, courts successfully and routinely engage in line drawing. For example, courts engage in the sometimes thorny exercise of assessing whether alleged improper influences on jurors are external – making juror testimony permissible under Rule 606(b) – or internal – making juror testimony impermissible under Rule 606(b). *See, e.g., Crawford v. Head*, 311 F.3d 1288, 1333-34 (11th Cir. 2002) (nursing student "bringing [her nursing] experiences to bear" on assessment of physical evidence properly before the jury constitutes permissible internal influence); *United States v. Vasquez-Ruiz*, 502 F.3d 700, 704-05 (7th Cir. 2007) (holding that "GUILTY" written in a juror's notebook mid-trial by an unknown source constitutes external influence); *United States v. Paneras*, 222 F.3d 406, 411 (7th Cir. 2000) (cartoon drawn by professional artist juror, and shared with other jurors, depicting defendant and his actions is internal influence); *Hard v. Burlington N. R.R. Co.*, 870 F.2d 1454, 1462 (9th Cir. 1989) (observing that juror's personal knowledge of "facts specific to the litigation" constitutes improper external influence but general knowledge such as "a basic understanding of x-ray interpretation" does not). This Court has praised lower courts for "wisely"

applying this internal/external distinction. *Tanner*, 483 U.S. at 118.

Courts use similar line-drawing exercises in assessing whether a juror's testimony pertains to racial bias in deliberations. For example, they distinguish stray comments from material ones, recognizing in the racial-bias context "that not every stray or isolated off-base statement made during deliberations requires a hearing at which juror testimony is taken." *Villar*, 586 F.3d at 87. Courts also recognize that when statements or expressions allegedly evidencing such bias are ambiguous, impeachment of the verdict should not necessarily follow. *See, e.g., State v. Brown*, 62 A.3d 1099, 1110-11 (R.I. 2013) (agreeing with trial court that, in case involving Native American defendant, juror's act of "banging water bottles like tom-tom drums" during deliberations is "ambiguous" and "capable of different interpretations" (internal quotation marks omitted)). For example, courts will examine "the precise content and context" of the racial statement at issue to determine "whether it reflects the juror's actual racial or ethnic bias, or whether it was said in jest." *Commonwealth v. McCowen*, 939 N.E.2d 735, 765 (Mass. 2010). And, of course, courts have substantial experience analyzing the "precise context and content," *id.*, of statements outside the racial-bias context in other 606(b) cases. *See, e.g., Elias*, 269 F.3d at 1020.

Finally, courts have substantial experience assessing whether juror misconduct was sufficiently prejudicial to warrant a new trial. *See supra*. In fact, many of the factors that courts already consider in

assessing whether particular juror misconduct is prejudicial would also apply to allegations of racial bias, including the extent to which the improper consideration was discussed and considered by the jury, at what point in deliberations the racial consideration was raised, and the strength of the government's case. *See Shillcutt*, 827 F.2d at 1159-60 (holding that alleged racial slur, even if made, would not have created sufficient prejudice to warrant habeas relief, where evidence suggested it was stray remark that did not affect deliberations or verdict); *State v. Watkins*, 526 N.W.2d 638, 640-41 (Minn. Ct. App. 1995) (finding prejudice where multiple jurors referred to defendant as "darky," evidence did not weigh heavily against defendant, and there were no curative measures or instructions on racial or ethnic bias); *see also Dietz*, 136 S. Ct. at 1894 (discussing multiple different factors that court may consider to determine whether prejudice was created by district court's recall of jury it had already discharged).

In sum, judicial treatment of jurors' allegations of racial bias mirrors courts' vigilant and resourceful approach to applying the existing Rule 606(b) exceptions. In the event more courts were to consider juror testimony of racial bias, there is little doubt they are well-equipped to assess such allegations and would continue to use the tools and practices already in place to do so efficiently and accurately.

CONCLUSION

For the foregoing reasons, the judgment of the Colorado Supreme Court should be reversed.

Respectfully submitted,

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In The

Supreme Court of the United States

MIGUEL ANGEL PENA-RODRIGUEZ,

Petitioner,

v.

STATE OF COLORADO,

Respondent.

On Writ Of Certiorari To The Colorado Supreme Court

BRIEF *AMICUS CURIAE* OF PROFESSOR CEDRIC MERLIN POWELL OF THE UNIVERSITY OF LOUISVILLE BRANDEIS SCHOOL OF LAW IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

The parties present this case as one arising under the Sixth Amendment right to an impartial jury, and primarily address their arguments to that constitutional provision. Pena-Rodriguez Pet. 2; *see also* Colorado Pet. Resp. 16-19. Because there is direct evidence that racial animus may have influenced at least one juror, and thus, the outcome of Petitioner Miguel Angel Pena-Rodriguez's jury trial, *amicus* believes this case also raises significant issues under the Equal Protection and Due Process Clauses of the Fourteenth Amendment. In addition to the Sixth Amendment, *amicus* contends that the Equal Protection Clause and Due Process Clause each serve as an independent basis to reverse the Colorado Supreme Court's decision interpreting Colorado Rule of Evidence (CRE) 606(b). Thus, *amicus* will address the following question:

> Whether the Colorado Supreme Court's categorical application of Rule 606(b) to bar post-verdict juror testimony and evidence concerning the presence of racial animus in jury deliberations is consistent with the Equal Protection and Due Process Clauses of the Fourteenth Amendment.

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INTEREST OF *AMICUS CURIAE*

In accordance with Supreme Court Rule 37, *amicus curiae* Professor Cedric Merlin Powell respectfully submits this brief in support of the Petitioner.[1] Professor Powell teaches constitutional law, criminal law, and evidence, among other courses, at the University of Louisville Louis D. Brandeis School of Law. Professor Powell has written on a broad range of topics, including this Court's criminal law and Fourteenth Amendment decisions. Specifically, Professor Powell has conducted extensive research on the interaction between race and crime, including the possibility of reform to address certain racial disparities in the administration of justice. Professor Powell sees this case as critical to increasing fairness in the criminal justice system, and improving public perception of the courts as a whole. Accordingly, Professor Powell has a profound interest in how this case is resolved because the Court's decision will affect the ability of trial courts to ensure that jury verdicts are fair, impartial, and rendered based upon the evidence presented at trial.

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[1] All parties have consented to the filing of this brief under Rule 37.3(a). Letters showing such consent have been filed with the Clerk of the Court. In accordance with Rule 37.6, *amicus* states that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus* or his counsel made a monetary contribution to the preparation and submission of this brief.

SUMMARY OF ARGUMENT

The Colorado Supreme Court concluded that Rule 606(b) barred a trial court from considering post-verdict juror testimony and other evidence showing that one juror, Juror H.C., made derogatory comments about the ethnicity and immigrant status of Pena-Rodriguez and an alibi witness. Pet. App. 2a-4a. The proposed post-verdict juror testimony and evidence also showed that Juror H.C. made statements about the supposed propensity of Mexicans and immigrants to commit sex offenses. *Id.* at 4a-5a. In doing so, the Colorado Supreme Court rejected Pena-Rodriguez's argument that Rule 606(b)'s categorical bar on the consideration of post-verdict juror testimony and evidence ran afoul of the Sixth Amendment right to an impartial jury. Pet. App. 11a-16a. Under the decision below, individual jurors are free to rely upon racial animus and racial stereotyping to decide the fate of criminal defendants, and Rule 606(b) bars those determinations from further constitutional challenge. That is not the law.

First, the presence of state evidentiary rules has never stopped this Court from addressing significant constitutional issues. State evidentiary rules must conform to the Constitution. When they do not, and instead serve as impediments to a criminal defendant's constitutional right to a fair and impartial trial by excluding competent and reliable evidence, they have been struck down as unconstitutional. Because the presence of racial animus in jury deliberations goes to the fairness of a criminal trial, it implicates the equal

protection and due process rights of defendants. And under this Court's precedent, Rule 606(b) cannot serve as an impenetrable roadblock to a criminal defendant's attempt to vindicate those rights by excluding competent and reliable juror testimony and evidence that jury deliberations were tainted by racial animus. Equal protection and due process are too important, and must supersede a state evidentiary rule, regardless of the policy considerations underlying it.

Second, the Colorado Supreme Court's decision ignores this Court's longstanding efforts to eradicate racial discrimination in the criminal justice system under the Equal Protection Clause. Juror H.C.'s ethnically derogatory comments about Pena-Rodriguez, immigrants, and the propensity of Mexicans to commit sex offenses are all based upon racial animus and stereotyping that is fundamentally at odds with that provision. If unchecked, racial animus permits jurors to rely upon inaccurate racial and ethnic group stereotypes instead of the facts and evidence presented at trial. Reliance on such stereotypes denies a criminal defendant an unbiased and rational determination of guilt or innocence that treats the defendant as an individual. That is the hallmark of equal protection.

None of the Colorado Supreme Court's asserted interests for insulating racially tainted jury verdicts from constitutional challenge are compelling under the Equal Protection Clause. The Colorado Supreme Court's first asserted interest, protecting the privacy of jury deliberations, is insufficiently compelling because jurors may discuss jury deliberations with anyone

post-verdict. The Colorado Supreme Court's second asserted interest, post-verdict juror harassment, is overstated because Rule 606(b) does not prohibit contact with jurors, but only the evidence that may come from such contact. If Rule 606(b) is intended to protect jurors, then jurors must have the right to waive such protections where a criminal defendant's right to equal protection is at stake. The Colorado Supreme Court's third asserted interest in finality and public confidence ignores that finality assumes a jury verdict was rendered based upon the evidence, not racial animus. Public confidence is enhanced not when a jury verdict is final, but when the jury verdict is both final and free from bias.

Third, the Colorado Supreme Court's decision is inconsistent with the Due Process Clause. Due process requires that a criminal defendant be tried by fair and impartial jurors based upon the evidence. That minimal standard of due process is not met where, as here, evidence suggests that at least one juror relied upon racial animus and stereotyping to reach a verdict. Race has no place in a criminal trial, and when a jury relies upon racial animus and stereotyping, it deprives a defendant of liberty based upon an arbitrary consideration. That violates the Due Process Clause, and Rule 606(b) should not be read to protect such verdicts from further examination.

ARGUMENT

I. This Court has historically invalidated state evidentiary rules that bar a criminal defendant from presenting competent and reliable testimony in order to ensure a fair and impartial trial.

This Court has repeatedly concluded that the categorical application of evidentiary rules cannot supersede the constitutional rights of criminal defendants. While this Court has "traditionally accorded [respect] to the States in the establishment and implementation of their own criminal trial rules and procedures," it has declared those rules and procedures invalid "where constitutional rights directly affecting the ascertainment of guilt are implicated." *Chambers v. Mississippi*, 410 U.S. 284, 302 (1973). Although evidentiary rules promote efficiency, judicial economy, and other important government interests, they must comport with the Constitution. *Crane v. Kentucky*, 476 U.S. 683, 690 (1986). Evidentiary rules cannot "be applied mechanistically to defeat the ends of justice," but must be aimed at protecting the criminal defendant's right to a fair and impartial trial. *Rock v. Arkansas*, 483 U.S. 44, 55 (1987) (quoting *Chambers*, 410 U.S. at 302).

For example, in *Washington v. Texas*, 388 U.S. 14, 16 (1967), this Court found that the application of state evidentiary rules declaring a certain class of witness – co-defendants – incompetent to testify at a criminal trial invalid under the Sixth Amendment. The Court reversed the defendant's conviction because the state's evidentiary rules arbitrarily denied the defendant "the

right to put on the stand a witness who was physically and mentally capable of testifying to events that he had personally observed, and whose testimony would have been relevant and material to the defense." 388 U.S. at 23. In concluding that the state's evidentiary rules violated the Sixth Amendment, this Court said that arbitrary evidentiary rules "that prevent whole categories of defense witnesses from testifying on the basis of a priori categories that presume them unworthy of belief" were unconstitutional. *Id.* at 22.

This Court applied the same rationale in *Rock*. This Court reversed a conviction where a state evidentiary rule completely barred the defendant from relying on "hypnotically refreshed testimony." *Rock*, 483 U.S. at 48-49. This Court reasoned that "[j]ust as a state may not apply an arbitrary rule of competence to exclude a material defense witness from taking the stand, it also may not apply a rule of evidence that permits a witness to take the stand, but arbitrarily excludes material portions of his testimony." *Id.* at 55. Again, this Court did not hesitate to strike down an evidentiary rule that arbitrarily excluded potentially reliable evidence that vindicated a criminal defendant's right to a fair and impartial trial.

This Court has also invalidated evidentiary rules where the reliability of the proposed testimony cannot be questioned. For instance, in *Chambers*, this Court emphatically rejected the categorical application of an evidentiary rule where "[t]he testimony rejected by the trial court . . . bore persuasive assurances of trustworthiness," was not inadmissible hearsay, and was

"critical to [the criminal defendant's] defense." *Id.* at 302.[2] In short, these cases make clear that "a state court may not apply a state rule of evidence in a per se or mechanistic manner so as to infringe upon a defendant's constitutional right to a fundamentally fair trial. . . ." *Paxton v. Ward*, 199 F.3d 1197, 1214 (10th Cir. 1999) (discussing cases). That rule should have governed here.

But the Colorado Supreme Court did not follow this Court's lead. Instead, the Colorado Supreme Court applied Rule 606(b) to completely bar post-verdict juror testimony and evidence suggesting that racial animus affected jury deliberations. Although Rule 606(b) permits jurors to "testify as to matters other than their own inner reactions," mistakes on verdict forms, and "prejudicial extraneous information or influences injected into or brought to bear upon the deliberative process" post-verdict, the Colorado Supreme Court's interpretation of Rule 606(b) renders jurors incompetent to testify about the presence of racial animus in deliberations. Fed. R. Evid. 606 advisory committee's note (1972) ("[Rule 606(b)] deals only with the competency of jurors to testify. . . ."); *see also* Pet. App.

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[2] *See also Crane*, 476 U.S. at 690 (concluding that "blanket exclusion" of testimony and exculpatory evidence concerning the defendant's confession deprived him of a fair trial); *Holmes v. South Carolina*, 547 U.S. 319, 326 (2006) (concluding that a state procedural rule excluding testimony and exculpatory evidence violated the defendant's right to present a defense).

8a-16a.[3] But there can be no more reliable or competent witness to testify about whether racial animus affected jury deliberations than a juror who actually participated in those deliberations. This content-based line between post-verdict juror testimony concerning racial animus in jury deliberations and other types of post-verdict juror testimony, is arbitrary.[4]

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[3] The Advisory Committee's comments to CRE 606 state that the Rule was modeled after its federal counterpart. CRE 606 advisory committee's comments (2007). The Colorado Supreme Court has also relied upon the Advisory Committee's notes to the Federal Rules of Evidence and federal case law to interpret the Colorado Rules of Evidence. *See, e.g.*, *People v. Stewart*, 55 P.3d 107, 123 (Colo. 2002); *see also People v. Eppens*, 979 P.2d 14, 20 (Colo. 1999).

[4] Further, the Advisory Committee's notes to Rule 606(b) states "that jurors should be encouraged to be conscientious in promptly reporting to the court misconduct that occurs during jury deliberations." Fed. R. Evid. 606 advisory committee's note (1974). That obligation should not change post-verdict. Jurors should also be encouraged to bring juror misconduct, including statements of racial animus, to the court's attention post-verdict as well. In fact, imposing a temporal restriction on post-verdict reports of juror misconduct and racial animus seems illogical when "jurors are not able to discuss the case with each other until deliberations themselves," which makes it "quite difficult for one juror to identify a peer's racial bias in the context of the case before the deliberations." Ashok Chandran, Note, *Color in the "Black Box": Addressing Racism in Juror Deliberations*, 5 Colum. J. Race & L. 28, 44 (2015). Additionally, a juror may not express racial animus toward the criminal defendant until jury deliberations, which cannot be supervised by either the court or counsel for the parties. Amanda R. Wolin, *What Happens in the Jury Room Stays in the Jury Room . But Should It?: A Conflict Between the Sixth Amendment and Federal Rule of Evidence 606(B)*, 60 UCLA L. Rev. 262, 282 (2012).

Singling out and excluding post-verdict juror testimony and evidence of racial animus in jury deliberations offends "our American ideal of fairness" from which "the concepts of equal protection and due process, both stem[]. . . ." *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954). Those principles are essential in a criminal trial. Indeed, the primary purpose of a criminal trial is to ascertain the truth in a proceeding that is free from bias, prejudice, and outside influences. *Sheppard v. Maxwell*, 384 U.S. 333, 362 (1966); *see also In re Murchison*, 349 U.S. 133, 136 (1955). Evidentiary rules should be interpreted to do the same. *See* Fed. R. Evid. 102. Nothing could be more contrary to the concepts of equal protection, due process, and fundamental fairness than to apply Rule 606(b) in a way that allows a racially tainted jury verdict of guilty to stand unchallenged.

Thus, the Colorado Supreme Court's ruling, if affirmed, not only places a criminal defendant's constitutional right to a fair and impartial trial under the Sixth Amendment in serious jeopardy, but also endangers a defendant's equal protection and due process rights by excluding otherwise reliable juror testimony and evidence concerning the presence of racial animus in jury deliberations as incompetent. State evidentiary rules, regardless of their purpose, cannot supplant the constitutional command that every criminal defendant is entitled to equal protection and due process in a jury trial.

II. The Colorado Supreme Court's application of Rule 606(b) in this case is inconsistent with this Court's jurisprudence under the Equal Protection Clause.

The Equal Protection Clause of the Fourteenth Amendment says that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1. This Court's earliest decisions interpreting the Fourteenth Amendment recognized that the primary purpose behind the Equal Protection Clause was to eliminate discrimination on the basis of race. *Strauder v. West Virginia*, 100 U.S. 303, 310 (1879); *see also Neal v. Delaware*, 103 U.S. 370, 394 (1880); *Bush v. Kentucky*, 107 U.S. 110, 119 (1883). In those cases, this Court "was concerned with the broad aspects of racial discrimination that the Equal Protection Clause was designed to eradicate . even though it addressed the issue in the context of reviewing an individual criminal conviction." *Rose v. Mitchell*, 443 U.S. 545, 555 (1979). Thus, for over a century, a fundamental principle of this Court's equal protection jurisprudence has been that "[d]iscrimination on the basis of race, odious in all aspects, is especially pernicious in the administration of justice." *Id.*

Following that principle, this Court has stated that "any official action that treats a person differently on account of his race or ethnic origin is inherently suspect," and is therefore, subject to strict scrutiny. *Fisher v. University of Texas at Austin*, 133 S. Ct. 2411, 2419 (2013) (quotation omitted). By applying strict scrutiny under the Equal Protection Clause, this Court has

"engaged in unceasing efforts to eradicate racial prejudice from our criminal justice system." *McCleskey v. Kemp*, 481 U.S. 279, 309 (1987) (quotation omitted). The great majority of those efforts have been aimed at eliminating the use of juries in criminal cases that are the product of racial animus toward the criminal defendant or individual jurors. *See, e.g.*, *Batson v. Kentucky*, 476 U.S. 79, 85 (1986). In doing so, this Court has recognized that trial by a fair and impartial jury is "a vital principle underlying the whole administration of criminal justice," and serves as "a criminal defendant's fundamental protection of life and liberty against race or color prejudice." *McCleskey*, 481 U.S. at 309 (quotation omitted); *id.* at 310 (quotation omitted).

The Equal Protection Clause, then, "do[es] not prohibit racial . . . bias in jury selection only to encourage it in jury deliberations." *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 153 (1994) (Kennedy, J., concurring). "Once seated, a juror should not give free rein to some racial . . . bias of his or her own." *Id.* Because a fair and impartial jury is central to the administration of justice, individual jurors, as actors empowered by the government to decide guilt and innocence, are obligated to base their verdicts on the evidence presented at trial. *McDonough Power Equipment, Inc. v. Greenwood*, 464 U.S. 548, 554 (1984).[5] "A juror who allows racial . . .

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[5] The jury in reaching the verdict in this case as well as the trial court's adoption and enforcement of that verdict both constitute official state action that is subject to the Fourteenth Amendment. As this Court noted in *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 624 (1991), "[t]he jury exercises the power of the court and of the government that confers the court's jurisdiction."

bias to influence assessment of the case breaches the compact and renounces his or her oath." *J.E.B.*, 511 U.S. at 153 (Kennedy, J., concurring). This case involves such a juror.

A. The statements of Juror H.C. are direct evidence that the jury verdict is a product of racial animus in violation of the Equal Protection Clause.

As the Colorado Supreme Court noted below, two affidavits from Jurors M.M. and L.T. allege that Juror H.C. made derogatory comments about the ethnicity and immigrant status of Pena-Rodriguez and an alibi witness during jury deliberations. Pet. App. 4a-5a. According to Jurors M.M. and L.T., Juror H.C. commented that he thought Pena-Rodriguez was guilty because "he's Mexican and Mexican men take whatever they want." Pet. App. 4a. Juror H.C. further stated that he "believed that [Pena-Rodriguez] was guilty because in his experience as an ex-law enforcement officer, Mexican men had a bravado that caused them to believe they could do whatever they wanted with women." *Id.* Juror H.C. also "said that where he used to patrol, nine

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And in *Shelley v. Kraemer*, 334 U.S. 1, 18 (1948), this Court said that "the action of the States to which the [Fourteenth] Amendment has reference, includes action of state courts and state judicial officials." This authority leaves no doubt that the actions of the trial court and individual jurors in this case are constrained by the requirements of equal protection and due process in accordance with the Fourteenth Amendment.

times out of ten Mexican men were guilty of being aggressive toward women and young girls." *Id.*

None of the comments by Juror H.C. concerning Pena-Rodriguez's guilt were based on any evidence at trial. Those statements were instead motivated by Juror H.C.'s belief that Mexican men are more likely to be "aggressive toward women and young girls," and thus, have a greater propensity to commit sex offenses. *Id.* In Juror H.C.'s view, Pena-Rodriguez's guilt was determined primarily by his ethnicity – that is, there was a 90% probability that Pena-Rodriguez, as a Mexican, committed the crime. A jury verdict based upon that kind of racial animus cannot be protected by Rule 606(b) consistent with the Equal Protection Clause.

Nothing can be more offensive to the concept of equal protection than a juror's use of racial prejudice and stereotyping in jury deliberations. Determinations of guilt based upon the assumption that a certain race or ethnicity has a greater propensity to commit crime – by even a single juror – has no place in the criminal justice system. *See Parker v. Gladden*, 385 U.S. 363, 365-66 (1966); *see also Dyer v. Calderon*, 151 F.3d 970, 973 (9th Cir. 1998) (en banc), *cert. denied*, 525 U.S. 1033 (1998). "One touchstone of a fair trial is an impartial trier of fact – 'a jury capable and willing to decide the case solely on the evidence before it.'" *McDonough*, 464 U.S. at 554 (quoting *Smith v. Phillips*, 455 U.S. 209, 217 (1982)). Because the facts of each case vary, this requires a jury to make a highly *individualized* factual determination about a criminal defendant's guilt or innocence. *See Zant v. Stephens*, 462 U.S. 862, 879

(1983); *see also Johnson v. California*, 543 U.S. 499, 509 (2006).

And "[a]t the heart of the Constitution's guarantee of equal protection lies the simple command that the [g]overnment must treat citizens as individuals, not as simply components of a racial . . . class." *Miller v. Johnson*, 515 U.S. 900, 911 (1995) (quotation omitted). Racial prejudice and stereotyping during jury deliberations rob the criminal defendant of the individualized consideration that the Equal Protection Clause demands. *See id.* Although jurors have a "general body of experiences . . . [they] are understood to bring with them to the jury room," racial bias and stereotypes are often not based upon actual experience, but upon a set of erroneous assumptions about a racial or ethnic group. *Warger v. Shauers*, 135 S. Ct. 521, 529 (2014); *see also Batson*, 476 U.S. at 104 (Marshall, J., concurring). Treating racial bias as "everyday experience" that a juror brings into jury deliberations legitimizes a form of racial animus and group stereotyping that this Court has repeatedly said is antithetical to the Equal Protection Clause. Pet. App. 10a; *see also Miller*, 515 U.S. at 911 (collecting cases).

Racial bias and stereotyping by a single juror places upon the criminal defendant a crude racial label that "is inconsistent with the dignity of individuals in our society." *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 797 (2007) (Kennedy, J., concurring). With racial labeling comes the negative stigma that certain racial and ethnic groups are more prone to commit crime, and the resulting presumption

that the criminal defendant is entitled to less protection at trial merely due to membership in one of those groups. Thus, the primary danger of such racial prejudice and stereotyping in jury deliberations is the assumption by one or more jurors that "members of the same racial group – regardless of their age, education, economic status, or the community in which they live – think alike," behave similarly, and therefore, share the same tendency to engage in criminal conduct. *Shaw v. Reno*, 509 U.S. 630, 647 (1993).

Further, using Rule 606(b) to ignore overt racial bias and stereotyping in juror deliberations encourages jurors "to substitute racial stereotype for evidence, and racial prejudice for reason." *Calhoun v. United States*, 133 S. Ct. 1136, 1137 (2013) (statement of Sotomayor, J.). In an ordinary criminal case where the jury is asked whether guilt has been proven beyond a reasonable doubt, a racially biased juror may employ racial stereotypes to disregard, or to urge other jurors to disregard, evidence at trial that tends to exonerate the criminal defendant. *See Parker*, 385 U.S. at 365-66. On the other hand, statements of racial bias and racial stereotyping during juror deliberations may be used to fill in evidentiary gaps to convict a criminal defendant. *Calhoun*, 133 S. Ct. at 1137 (statement of Sotomayor, J.) (quotation omitted); *see also* Amicus Br. of NACDL in Support of Cert. 8-10. Where there is direct evidence of racial bias and stereotyping in jury deliberations, there is a strong risk that the criminal defendant's race or ethnicity played a significant, if not predominant, role in the jury verdict. *See Bush v. Vera*, 517 U.S.

952, 959 (1996). This offends the Equal Protection Clause, and entitles a criminal defendant to at least an evidentiary hearing to determine what role racial bias had in the jury verdict.

Leaving jury verdicts based upon racial prejudice and stereotyping to stand unchallenged under Rule 606(b) sends a chilling message to the broader community. Protecting jury verdicts motivated by racial animus under Rule 606(b) tells all citizens that racial and ethnic minorities may be judged and punished by the color of their skin alone. Such verdicts also convey the message that racial and ethnic minorities are not entitled to the same protections under the Equal Protection Clause – that it is permissible to assume that they are criminals first and individuals second. This Court's precedent does not allow for such differential treatment. To the extent the opinion below is inconsistent with this Court's equal protection decisions, it should be reversed.

B. The Colorado Supreme Court's asserted interests for its interpretation of Rule 606(b) are not compelling enough to permit the racially tainted jury verdict in this case.

The Colorado Supreme Court believed that Rule 606(b) could be invoked to shield racially tainted jury verdicts because "[p]rotecting the secrecy of jury deliberations is of paramount importance in our justice system." Pet. App. 13a. The Colorado Supreme Court

also emphasized that invoking Rule 606(b) in this instance promoted finality and helped preserve public confidence in "the fundamental notion of trial by jury." *Id.* Additionally, the Colorado Supreme Court thought that unconditional application of Rule 606(b) curtailed the likelihood of post-verdict juror harassment. *Id.* at 14a (quoting *McDonald v. Pless*, 238 U.S. 264, 267-68 (1915)). While important policy considerations, none of these asserted interests are sufficiently compelling under the Equal Protection Clause.

None of the Colorado Supreme Court's justifications fall within the limited circumstances in which the government may permissibly consider race under the Equal Protection Clause.[6] Indeed, this Court has been reluctant to recognize new compelling interests when racial animus impacted a criminal defendant's right to a fair and impartial jury trial. *See J.E.B.*, 511 U.S. at 137 n.8 (refusing to recognize a "special state interest" in establishing paternity of a child born out of wedlock). And for good reason: because of the importance of a fair and impartial jury trial in the administration of justice, and the primary aim of the Equal Protection Clause to prohibit racial discrimination, the only *compelling* interest a state can have "in *every* trial is to see that the proceedings are carried out in a fair,

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[6] *See, e.g., Korematsu v. United States*, 323 U.S. 214, 217-18 (1944) (national security); *see also City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 509 (1989) (government may take race-conscious remedies to address past racism for which it was responsible); *Grutter v. Bollinger*, 539 U.S. 306, 339-40 (2003) (permitting use of race in college admissions to promote diversity).

impartial, and nondiscriminatory manner." *Id.* (emphasis in original).

In addition, the Colorado Supreme Court's asserted interest in protecting the privacy of jury deliberations loses force post-verdict. *See Capital Cities Media, Inc. v. Toole*, 463 U.S. 1303, 1306 (1983) (Brennan, J., Circuit Justice). After a verdict is rendered, jurors may discuss a verdict, and the underlying jury deliberations that culminated in that verdict, with anyone. *See* Wolin, *supra* at 294-95. The fact that jurors can discuss jury deliberations everywhere except the courtroom severely undercuts any argument that the privacy of jury deliberations is a compelling state interest that justifies excluding evidence that racial bias and stereotyping may have directly influenced the outcome. *See id.* If a state's true interest is to protect "the freedom of the jury to reach verdicts on the basis of bias or prejudice without fear of discovery," then there is no way that interest could be compelling in light of this Court's continuing efforts to eradicate racial bias in all areas of the criminal justice system. *Id.*; *see also McCleskey*, 481 U.S. at 309.

Similarly, the Colorado Supreme Court's concern about post-verdict juror harassment is exaggerated. Rule 606(b) itself "does not prohibit the contact that would cause . . jurors to be harassed and embarrassed but rather only use of the evidence that may come from those contacts." Wolin, *supra* at 296. The breadth of Rule 606(b) even bars consideration of evidence where a juror is willing to voluntarily forego the protections of the Rule to come forward with information that jury

deliberations were tainted by racial animus. *See id.* If a criminal defendant may waive the protections of an evidentiary rule that supposedly inures to his or her benefit, then a juror should have the same right, especially where the waiver would vindicate a criminal defendant's right to a fair and impartial trial. *See United States v. Mezzanatto*, 513 U.S. 196, 804-05 (1995).

The Colorado Supreme Court was also incorrect when it found that finality is an interest that requires the enforcement of racially tainted jury verdicts. A state does not have an interest in mere finality; instead, the concept of finality, in addition to promoting efficiency, incorporates the idea that the criminal defendant received a fair and impartial trial, and that the jury based its verdict solely on the evidence presented at that trial. *See McDonough*, 464 U.S. at 554. Finality necessarily assumes that a jury verdict is free from racial animus.

Thus, in both a jury trial and jury deliberations, a state must ensure that the process "produces decisions based on fair procedures, accurate fact-finding, and community values." Victor Gold, *Juror Competency to Testify That a Verdict Was the Product of Racial Bias*, 9 St. John's J. Legal Comment. 125, 132 (1993). And reaching a verdict that is both fair and accurate based upon the evidence must outweigh the state's interest in finality and cost-savings if the criminal justice system is to retain any legitimacy in view of the public. *See Tanner v. United States*, 483 U.S. 107, 137 (1987) (Marshall, J., concurring in part). "Permitting defendants to expose racially tainted deliberations gives the

public – particularly minority citizens – *more* reason, not *less*, to trust the final results of the criminal justice system." *Racist Juror Misconduct During Deliberations*, 101 Harv. L. Rev. 1595, 1600 (1988) (emphasis in original); *see also J.E.B.*, 511 U.S. at 154 (Kennedy, J., concurring) ("Nothing would be more pernicious to the jury system than for society to presume that persons of different backgrounds go to the jury room to voice prejudice.").

None of the policy concerns that drove the Colorado Supreme Court's analysis in this case are compelling enough for this Court to depart from the rule that race and ethnicity are illegitimate considerations in the administration of justice under the Equal Protection Clause. The Colorado Supreme Court's decision should be reversed.

III. The Colorado Supreme Court's interpretation of Rule 606(b) violates the Due Process Clause because it forecloses any challenge to jury verdicts that are racially tainted and arbitrary.

The Due Process Clause states that "[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law[.]" U.S. CONST. amend. 14 § 1. As this Court noted in *Murchison*, "[a] fair trial in a fair tribunal is a basic requirement of due process." 349 U.S. at 136. Thus, "it [is] well established that the Due Process Clause protects a defendant from jurors who are actually incapable of rendering an impartial

verdict, based on the evidence and the law." *Peters v. Kiff*, 407 U.S. 493, 501 (1972).

Because race-based decision-making by the government is inherently arbitrary, it implicates the Due Process Clause. *Bolling*, 347 U.S. at 500. As an arbitrary consideration, race has no place in the administration of justice. *See United States v. Armstrong*, 517 U.S. 456, 464 (1996). And in a criminal trial, when a jury "[e]mploy[s] racial bias to reach a verdict[,] [it] is analogous to flipping a coin," and arbitrarily deprives a criminal defendant of liberty under the Due Process Clause. Gold, *supra*, at 139; *see also Bolling*, 347 U.S. at 500 (noting that the government's invidious use of race "constitutes an arbitrary deprivation of . . . liberty" in violation of due process).[7]

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[7] Although *Bolling* is sometimes characterized as an equal protection decision, some commentators argue that the case is more accurately described as a due process case that is concerned about arbitrary deprivations of liberty. *See, e.g.*, *United States v. Windsor*, 133 S. Ct. 2675, 2706 (2013) (Scalia, J., dissenting); *see also* David E. Bernstein, *Lochner v. New York: A Centennial Retrospective*, 83 Wash. U. L.Q. 1469, 1513-14 (2005) ("[A] close reading of *Bolling* reveals that while dicta in *Bolling* states that the concept of due process overlaps to some extent with the concept of equal protection, the ultimate holding of the Court is based on the traditional due process concern that the government not engage in arbitrary deprivation of liberty."). While the due process issues in this case intersect with the equal protection concerns described above, this Court should treat due process and equal protection as two separate independent grounds to reverse the Colorado Supreme Court. Here, Pena-Rodriguez suffered a loss of liberty by being sentenced to probation and required to register as a sex offender, which imposes a host of legal restrictions and other stigmatizing effects upon him. Pena-Rodriguez Pet. 6; *see also*

A. The Colorado Supreme Court's reading of Rule 606(b) denies criminal defendants due process by permitting jury verdicts motivated by racial animus.

The Colorado Supreme Court's decision below cannot be read consistent with this Court's interpretation of the Due Process Clause. Under the Colorado Supreme Court's logic, so long as it occurs in the jury room, Rule 606(b) permits a juror – like Juror H.C. in this case – to rely upon racial animus and stereotyping to reach a verdict. But a criminal defendant's right to due process does not end when the door to the jury room shuts. In most other contexts, the use of racial animus and stereotyping by a government actor is generally banned under the Constitution. But the Colorado Supreme Court's reading of Rule 606(b) allows jurors to engage in the very type of arbitrary race-based decision-making this Court has said is clearly impermissible under the Due Process Clause. *E.g.*, *Armstrong*, 517 U.S. at 464.

Rule 606(b) does not create an exception to the Due Process Clause, and evidentiary rules must yield to the Constitution, not the other way around. "The right to a trial by an impartial jury lies at the very heart of due process," and "[f]airness and reliability

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Gagnon v. Scarpelli, 411 U.S. 778, 782 (1973) ("Probation revocation, like parole revocation, is not a stage of a criminal prosecution, but does result in a loss of liberty."); *Smith v. Doe*, 538 U.S. 84, 112 (2003) (Stevens, J., concurring). To the extent that sentence was imposed through a racially tainted jury verdict, it is arbitrary and a violation of the Due Process Clause.

are assured only if the verdict is based on calm, reasoned evaluation of the evidence presented at trial." *Smith*, 455 U.S. at 224-25 (Marshall, J., dissenting). But if the Colorado Supreme Court's decision is left undisturbed, Rule 606(b) insulates a jury verdict that is the product of racial animus and stereotyping from ever being challenged. That precludes a criminal defendant, like Pena-Rodriguez here, from ever vindicating his due process rights, even where there is clear evidence that the jury verdict stems from constitutionally illegitimate considerations. That cannot be the law.

B. Juror H.C.'s ethnically derogatory statements are direct evidence that the jury verdict against Pena-Rodriguez was tainted by actual bias in violation of the Due Process Clause.

Juror H.C.'s statements during jury deliberations are direct evidence that the jury verdict reached in Pena-Rodriguez's case was the product of "deep and bitter prejudice" harbored toward Mexicans and immigrants. *Irvin v. Dowd*, 366 U.S. 717, 727 (1961). Juror H.C.'s race-based probability analysis suggests that at least in his view, Pena-Rodriguez was predisposed to committing the crime, and therefore, most likely guilty before jury deliberations – in fact, perhaps before trial – even began. Where there is evidence of actual bias towards a criminal defendant and that jurors are inclined to find the defendant guilty because of such bias, this Court has found a violation of the Due Process

Clause. *E.g.*, *Irvin*, 366 U.S. at 727; *see also Estes v. Texas*, 381 U.S. 532, 534-35 (1965). This case is no different.

And even assuming that Juror H.C.'s vote on the verdict was ultimately based upon the evidence presented at trial, the fact that he made ethnically derogatory statements and sought to influence other jurors to act upon racial animus and engage in racial stereotyping cannot survive under the Due Process Clause. This Court has made clear that "even if there is no showing of actual bias in the tribunal . . . due process is denied by circumstances that create the *likelihood or the appearance of bias*." *Peters*, 407 U.S. at 502 (emphasis added). In order to show a due process violation in a criminal trial, this Court has only required a criminal defendant to show that the trial was tainted by a probability of bias. *Estes*, 381 U.S. at 545. This Court has always assumed that where there is some evidence that jurors were biased, that it is "highly probable that [such bias] will have a direct bearing on [a juror's] vote as to guilt or innocence." *Id.* The showing made by Pena-Rodriguez here is at least enough to entitle him to a hearing on that issue.

This Court, therefore, should reject the Colorado Supreme Court's reading of Rule 606(b) to the extent it bars consideration of Juror H.C.'s statements and the jury verdict from further review in the trial court as inconsistent with due process.

CONCLUSION

For the foregoing reasons, the Colorado Supreme Court's decision should be reversed, and this case remanded for further proceedings to determine whether Pena-Rodriguez is entitled to a new trial.

Respectfully submitted,

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Supreme Court of the United States

MIGUEL ANGEL PEÑA RODRIGUEZ,

Petitioner,

v.

STATE OF COLORADO,

Respondent.

ON WRIT OF CERTIORARI
TO THE COLORADO SUPREME COURT

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27 Charles Alan Wright & Victor James Gold, *Federal Practice and Procedure* § 6074 (2d ed. 2007) 7, 8, 9, 10

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INTEREST OF *AMICI CURIAE*

Amici are law professors who specialize in evidence and criminal law and procedure.[1] As legal academics, *amici* have an interest in the consistent and correct application of the rules of evidence, and in reconciling those rules with the constitutional right to a fair trial.

The brief is joined by the following professors:

Barbara Allen Babcock, Judge John Crown Professor of Law, Emerita, Stanford Law School.

Jeffrey Bellin, Cabell Research Professor of Law, William and Mary Law School.

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[1] Pursuant to Rule 37.6, *amici* affirm that no counsel or party authored this brief in whole or part. Duke University School of Law supports faculty research and scholarship, and that financial support contributed to the costs of preparing this brief. Otherwise, no person or entity apart from the *amici* and their counsel made any monetary contribution intended to fund the preparation or submission of this brief. Duke University is not a signatory to the brief, and the views expressed here are solely those of the *amici*. The parties' letters of consent to the filing of this brief have been filed with the Clerk's Office. Counsel of record received timely notice of the intent to file this brief.

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SUMMARY OF ARGUMENT

The rules prohibiting juror impeachment should give way to Sixth Amendment concerns when a jury member comes forward with evidence of racially or ethnically biased statements made during deliberations about a criminal defendant's guilt.

First, the fundamental unfairness of a guilty verdict tainted by racial prejudice raises particularly acute constitutional concerns. An essential component of the right to a fair criminal trial is an impartial jury, and racial or ethnic bias poses a unique threat to that impartiality. *See Wright v. United States*, 559 F. Supp. 1139, 1151 (E.D.N.Y. 1983) ("If a criminal defendant could show that the jury was racially prejudiced, such evidence could not be ignored without trampling the Sixth Amendment's guarantee to a fair trial and an impartial jury."). Indeed, racial or ethnic prejudice against a defendant abridges the fair trial right almost "by definition." *Warger v. Shauers*, 135 S. Ct. 521, 529 n.3 (2014).

Second, juror testimony is likely to be the only available evidence to establish such prejudice. The "usual safeguards" this Court has pointed to in prior cases about juror bias are not "sufficient to protect the integrity of the process" in cases of racial or ethnic bias during deliberations. *Id.* Both the substance and the structure of the juror statements here distinguish the issues from the considerations before the Court in earlier cases concerning exceptions to Rule 606(b). *Tanner v. United States*, 483 U.S. 107, 127 (1987), addressed juror competency rather than juror prejudice. The impairment in *Tanner* (intoxication) was also of a type that could be exposed through means other

than reliance on juror testimony. Intoxication may be observed in the courtroom and is also a potential subject of testimony by non-jurors. Similarly, the nature of the bias at issue in *Warger*—bias induced by a juror's "views about negligence liability for car crashes" that resulted from a prior accident involving her daughter, 135 S. Ct. at 529—differs from racial or ethnic prejudice against a defendant. It is significantly more likely to be discernable from external evidence or revealed during voir dire.

Third, the administrability concerns that arise with general claims of juror dishonesty or partiality are not present in the narrower and clearer case of expressly racist statements by deliberating jurors. The experience of jurisdictions that have admitted juror testimony on the limited question of racial or ethnic bias suggests that doing so will not meaningfully burden the courts or unduly infringe on juror privacy. These courts have continued to preclude impeachment of jurors unless there is objective verification that they made overtly racist statements focused on a criminal defendant's guilt or innocence.

Nor would any new procedural mechanisms be required to apply a constitutional exception to Rule 606(b). Pursuant to the enumerated exceptions to the rule, courts already consider juror testimony on "extraneous prejudicial information" such as media accounts and "outside influences" such as threats and bribes. And the factual question they would be considering here is an objective one: whether a racist comment about the defendant was uttered by a deliberating juror. Courts need not even inquire into the statement's effect on internal mental processes in order to address the issue of a remedy. The core

concerns about protecting deliberations that gave rise to Rule 606(b) thus are not implicated.

Finally, the policy justifications for Rule 606(b) are not served by applying it in this context. Permitting verdicts tainted by racial or ethnic bias to remain in place in the interest of "finality" does profound harm to the criminal justice system. When racial or ethnic prejudice comes to light but evidentiary rules bar its consideration, public confidence in the "integrity" of adjudication declines. Leaving potentially unconstitutional verdicts entirely "beyond effective reach" only promotes "irregularity and injustice." Fed. R. Evid. 606(b), Advisory Committee Note to subdivision (b).

When there is direct evidence that a deliberating juror expressed clear racial or ethnic bias, there is also a serious constitutional question about a fair and impartial jury. Courts should be permitted to consider juror testimony when faced with that question.

ARGUMENT

I. THE PARAMOUNT CONSTITUTIONAL CONCERN WITH RACIAL OR ETHNIC DISCRIMINATION AGAINST CRIMINAL DEFENDANTS SHOULD OVERRIDE THE EVIDENTIARY BAR TO IMPEACHMENT BY JUROR TESTIMONY.

This case arises at the intersection of the Sixth Amendment fair trial guarantee and the difficult and lasting problem of racial prejudice among jurors. As this Court has previously stated, "no right ranks higher than the right of the accused to a fair trial," *Press-Enter. Co. v. Superior Court*, 464 U.S. 501, 508 (1984), and "the inestimable

privilege of trial by jury" underlies "the whole administration of criminal justice," *Holland v. Illinois*, 493 U.S. 474, 511 (1990) (Stevens, J., dissenting).

Racial or ethnic bias is an "especially pernicious" form of prejudice in the criminal justice process to which this Court has long applied special scrutiny. *Rose v. Mitchell*, 443 U.S. 545, 555 (1979); *see also Georgia v. McCollum*, 505 U.S. 42, 58 (1992) (a defendant has "a right to an impartial jury that can view him without racial animus, which so long has distorted our system of criminal justice"); *Holland*, 493 U.S. at 511 (1990) (Stevens, J., dissenting) (noting the Court's "unceasing efforts to eradicate racial prejudice from our criminal justice system").

The Court has been vigilant, for example, about state-sponsored prejudice when prosecutors exercise peremptory challenges of jurors for racially discriminatory reasons. *See Batson v. Kentucky*, 476 U.S. 79, 88 (1986). As the Court recently confirmed, "striking even a single prospective juror for a discriminatory purpose" violates the Constitution. *Foster v. Chatman*, 2016 WL 2945233 at *2 (U.S. May 23, 2016) (quoting *Snyder v. Louisiana*, 552 U.S. 472, 478 (2008)). Racial bias in the selection of jurors jeopardizes not only the fairness of the defendant's trial but the "very integrity of the courts." *Miller-El v. Dretke*, 545 U.S. 231, 238 (2005). It damages "both the fact and the perception" of the jury's role as a "vital check against wrongful exercise of power by the State." *Powers v. Ohio*, 499 U.S. 400, 411 (1991).

The Court should be no less vigilant when allegations arise that express racial or ethnic

prejudice has tainted a jury's deliberations. *Cf. McCollum*, 505 U.S. at 62 (Thomas, J., concurring) (cautioning against "exalting the rights of citizens to sit on juries over the rights of the criminal defendant, even though it is the defendant, not the jurors, who faces imprisonment or even death"). Indeed, "the constitutional interests of the affected party are at their strongest when a jury employs racial bias in reaching its verdict." 27 Charles Alan Wright & Victor James Gold, *Federal Practice and Procedure* § 6074, at 513 (2d ed. 2007); *see also Kittle v. United States*, 65 A.3d 1144, 1155 (D.C. 2013) (noting the "insidiousness of racial or ethnic bias").

In petitioner's case—which involves sexual assault and harassment charges—a seated juror argued during deliberations that "Mexican men take whatever they want," Pet. App. 4a, that "Mexican men had a bravado that caused them to believe they could do whatever they wanted with women," *id.*, that "Mexican men [are] physically controlling of women because they have a sense of entitlement," *id.*, and that the juror's experience in law enforcement suggested that "nine times out of ten Mexican men were guilty of being aggressive toward women and young girls," *id.*

When prejudiced comments with this sort of racist substance taint a verdict, that defect in the proceedings requires closer scrutiny than other types of juror misconduct or bias. In the *Warger* case, for example, a juror's personal experience may have predisposed her to find for the defendant in a civil case involving a car accident. *See* 135 S. Ct. at 524-25. The Court found that the juror's partiality was "internal" to deliberations and covered by Rule 606(b). *Id.* at 530. But *Warger* did not involve the

sort of bigotry against a criminal defendant that the facts of the present case raise. Partiality in the form of explicit racial or ethnic prejudice "undermines the jury's ability to perform its function as a buffer against governmental oppression and, in fact, converts the jury itself into an instrument of oppression." Wright & Gold § 6074, at 513. Racially motivated factfinders pose perhaps the greatest risk to a fair trial, and they should not find protection behind the no-impeachment rule. *See, e.g.*, *Strauder v. West Virginia*, 100 U.S. 303, 309 (1879) (finding that prejudices against "particular classes" that "sway the judgment of jurors" "deny to persons of those classes the full enjoyment of that protection which others enjoy").

Bias, moreover, raises particularly significant constitutional issues in criminal cases, which is a context that *Warger* also did not present. *See Rose*, 443 U.S. at 563. The guarantee of an impartial jury "goes to the very integrity of the legal system." *Gray v. Mississippi*, 481 U.S. 648, 668 (1987). Fundamental fairness depends on factfinders who are free from any "predisposition about the defendant's culpability." *Gomez v. United States*, 490 U.S. 858, 873 (1989). Jurors are not "impartial" in the "constitutional sense of that term" if they have "strong and deep impressions" that "close the mind against the testimony that may be offered in opposition to them." *United States v. Burr*, 25 F. Cas. 49, 51 (C.C.D. Va. 1807); *see also Parker v. Gladden*, 385 U.S. 363, 366 (1966) (per curiam) ("[P]etitioner was entitled to be tried by 12, not 9 or even 10, impartial and unprejudiced jurors"); *Aldridge v. United States*, 283 U.S. 308, 313 (1931) (stating that a "gross injustice" is perpetrated if a

juror "entertain[s] a prejudice which would preclude his rendering a fair verdict.").

In construing the common law precursor to 606(b), the Court has held that the no-impeachment rule must be sufficiently pliable to accommodate the interests of justice. There should be some measure of flexibility in the rule, the Court has recognized, because cases might arise in which its rigid application violates "the plainest principles of justice." *McDonald v. Pless*, 238 U.S. 264, 269 (1915) (quoting *United States v. Reid*, 53 U.S. 361, 366 (1851)); *see also Warger*, 135 S. Ct. at 529 n.3; *Clark v. United States*, 289 U.S. 1, 16 (1933). As the Court in *Warger* also noted, "[t]here may be cases of juror bias so extreme" that the no-impeachment rule must yield to constitutional concerns. 135 S. Ct. at 529 n.3.

For Rule 606(b) to accommodate juror testimony on the narrow question of racist comments during deliberations would also be consonant with the Court's broader jurisprudence about conflicts between fair trial rights and exclusionary rules. When evidentiary bars "insulate from discovery the violation of constitutional rights," they may "themselves violate those rights." Wright & Gold § 6074, at 513. Accordingly, the Court has also held that the rules of evidence must give way if they preclude "the meaningful opportunity to present a complete defense." *Holmes v. South Carolina*, 547 U.S. 319, 324, 331 (2006); *see also Green v. Georgia*, 442 U.S. 95, 97 (1979) ("In these unique circumstances, 'the hearsay rule may not be applied mechanistically to defeat the ends of justice.'") (quoting *Chambers v. Mississippi*, 410 U.S. 284, 302 (1973)); *Davis v. Alaska*, 415 U.S. 308, 320 (1974) ("The State's policy interest in protecting the

confidentiality of a juvenile offender's record cannot require yielding of so vital a constitutional right as the effective cross-examination for bias of an adverse witness.").

When the Court balances competing interests to determine whether a defendant's fair trial rights should override an evidentiary exclusion, the central question is whether "the interests served by a rule justify the limitation imposed on a defendant's constitutional right." *Rock v. Arkansas*, 483 U.S. 44, 56 (1987). The policy interests behind enforcement of Rule 606(b) are simply "at their weakest" in cases of jury bias involving racial prejudice. *See* Wright & Gold § 6074, at 513. Because racial or ethnic animus by jurors poses a particular danger to fair trial rights, the Rule 606(b) bar should not preclude consideration of juror testimony about the narrow category of statements expressly revealing such prejudice during deliberations.

II. ALTERNATE MECHANISMS FOR UNCOVERING TAINTED DELIBERATIONS ARE INSUFFICIENT SUBSTITUTES FOR JUROR TESTIMONY ABOUT RACIAL OR ETHNIC BIAS.

An exception to the rule against juror impeachment is particularly important with respect to racial or ethnic bias because it is unlikely otherwise to be ferreted out. The *Tanner* Court envisioned safety valves through which alleged biases would be revealed and addressed despite the Rule 606(b) bar: mechanisms like external observation and the voir dire process, as well as non-juror or pre-verdict evidence of misconduct. 483 U.S. at 127. The Colorado Supreme Court in this case, and other courts that have followed similar

reasoning, relied on these safeguards to conclude that the *Tanner* protections are "also available to expose racial biases." *United States v. Benally*, 546 F.3d 1230, 1240 (CA10 2008), *cert. denied*, 558 U.S. 1051 (2009).

Yet visual observation by the judge, counsel, or court personnel can do little to bring racial or ethnic bias to light. Incompetence and prejudice reveal themselves differently. For example, non-jurors are unlikely witnesses to prejudicial statements about a defendant, even though they can often testify to misconduct like intoxication. Racial animus also lies especially well hidden. The bias at issue in *Warger*—a juror's sympathy with a defendant who had caused a car accident—might have been established through objective evidence about her personal history, or through statements that the juror made outside of the jury room. But evidence beyond the jury deliberations is unlikely to reveal a juror's racially discriminatory reaction to the evidence at trial. Although there could be indications of animus such as membership in certain groups, complaints involving other racial discrimination, or past behavior towards individuals of other races or ethnicities, those external signals would not necessarily connect to invidious discrimination against a criminal defendant.

Furthermore, the voir dire process itself will rarely uncover racial or ethnic prejudice in jurors. Voir dire questioning might expose incentives like the *Warger* juror's potential identification with the defendant because of her daughter's experience. Nothing inhibited the *Warger* juror from freely expressing her views about liability for car accidents during voir dire. When it comes to racial or ethnic bias, however, a juror can hardly be expected to

acknowledge that he harbors some prejudice. A juror "may have an interest in concealing his own bias" or may even be "unaware of it." *See McDonough Power Equip., Inc. v. Greenwood*, 464 U.S. 548, 558 (1984) (Brennan, J., concurring); *see also* Neil Vidmar & Valerie P. Hans, American Juries: The Verdict 91 (2007); Maria Krysan, *Privacy and the Expression of White Racial Attitudes: A Comparison Across Three Contexts*, 62 Pub. Opinion Q. 506, 507-09 (1998) (describing experiments on social pressure to conform to norms against prejudice). "Some jurors will intentionally deceive the courts, perhaps because they are ashamed to admit attitudes that are socially unfashionable or even because they might welcome the chance to seek retaliation against a litigant." Barbara Allen Babcock, *Voir Dire: Preserving "Its Wonderful Power"*, 27 Stan. L. Rev. 545, 554 (1975). And "the more prejudiced or bigoted the jurors, the less they can be expected to confess forthrightly and candidly their state of mind in open court." *Id.*; *see also* Jessica L. West, *12 Racist Men: Post-Verdict Evidence of Juror Bias*, 27 Harv. J. Racial & Ethnic Just. 165, 201 (2011) ("Because jurors may have difficulty recognizing or admitting their biases, the potential for misrepresentations of bias may be even greater than it is for other types of juror misrepresentations.").

During the voir dire process in the present case, for example, prospective jurors were repeatedly asked routine questions about whether they could be "fair" and whether they had feelings "for or against" petitioner. Pet. App. 3a. No juror acknowledged any racial or ethnic bias. *Id.* Two of the seated jurors have since alleged that in the intimacy of the jury room, away from authority figures and public scrutiny in the courtroom, a juror made repeated

statements to the effect that the jury should convict the defendant "because he's Mexican." Pet. App. 4a. A juror's overt bias was clearly intertwined with consideration of the defendant's culpability. But the sole mechanism for addressing this "grave" instance of juror prejudice was consideration of statements made during deliberations and brought to light by a juror after the verdict. *United States v. Villar*, 586 F.3d 76, 87 (CA1 2009).

Although courts applying Rule 606(b) to potential racial or ethnic bias point to the possibility that jurors can express concerns about deliberations prior to the verdict, that rarely occurs. *See Kittle v. United States*, 65 A.3d at 1155; *Commonwealth v. Laguer*, 571 N.E.2d 371, 376 (Mass. 1991). As in this case, jurors typically come forward only after a verdict is rendered. The Court's recent decision in *Warger* has also foreclosed post-trial evidence that a juror concealed biases during voir dire. 135 S. Ct. 521. *Cf.* West, *supra*, at 202 (advocating a 606(b) exception for cases in which juror statements during deliberations reveal a discrete misrepresentation about bias during voir dire).

Accordingly, post-verdict juror testimony is likely to be "the only available evidence to establish racist juror misconduct." *Racist Juror Misconduct During Deliberations*, 101 Harv. L. Rev. 1595, 1596 (1988). And the surface protections that the Court referenced in *Tanner* will not suffice to protect Sixth Amendment rights. *See* West, *supra*, at 187 (concluding that the *Tanner* protections against juror bias and misconduct fail when it comes to racial bias in the deliberative process).

III. A NARROW EXCEPTION FOR CONSIDERATION OF JUROR TESTIMONY ABOUT DISCRIMINATORY STATEMENTS AS TO A DEFENDANT'S GUILT OR INNOCENCE IS WORKABLE AND CONSONANT WITH EXISTING EXCEPTIONS TO 606(b).

A narrow constitutional exception to consider juror testimony on racial or ethnic bias will not meaningfully increase the administrative burden on the courts or lead to undue harassment of jurors. In jurisdictions where it has been permitted, the potential ability to impeach jurors on these issues has not opened the door to juror testimony beyond a small subset of cases involving overt discrimination directed at the defendant. It has not required courts to evaluate mental processes of jurors in the context of deliberations. Nor is there any indication that the few claims of this nature have increased post-verdict juror harassment.

In the many courts that allow such impeachment, there has been no "barrage of postverdict scrutiny of juror conduct." *Tanner*, 483 U.S. at 120-21. In the nineteen federal and state jurisdictions that are already hospitable to juror impeachment on the question of racial or ethnic bias, decades of appellate case law reflect only thirty claims by defendants who sought to introduce juror testimony concerning racial or ethnic bias in deliberations. Experience thus suggests that these claims will arise infrequently and that courts can ably sort and evaluate them when they do.

Although a constitutional exception to Rule 606(b) will require more courts to engage in line-drawing, statements concerning explicit racial or

ethnic bias in the consideration of the defendant's guilt can be readily identified. Even in factual situations where prejudice is much harder to disentangle from the surrounding facts, such as prosecutorial bias in the exercise of peremptory challenges, the Court has stated that it cannot be "blind" to "the circumstances that bear upon the issue of racial animosity." *Foster*, 2016 WL 2945233 at *18. Yet in contrast to nuanced inquiries such as *Batson* challenges, an exception for racist statements during deliberations is circumscribed by inherent limiting principles. It extends only to express racial or ethnic animus pertaining to the defendant and addressed to the substance of the case.

The courts that have recognized a constitutional override in cases of alleged racial prejudice only hear testimony when the statements directly relate to the Sixth Amendment concern by implicating objective facts about the case. The Sixth Amendment issue arises when the juror's statements are linked with consideration of the defendant's guilt or innocence and "received and utilized by the jury in an evidentiary context." *Smith v. Brewster*, 444 F. Supp. 482, 490 (S.D. Iowa 1978). Accordingly, comments made by jurors to non-jurors, *Wright*, 559 F Supp. at 1129, statements to non-deliberating jurors, *United States v. Shalhout*, 507 Fed. Appx. 201, 207 (CA3 2012), and offhand remarks after a verdict had already been reached, *Shillcutt v. Gagnon*, 827 F.2d 1155, 1158-59 (CA7 1987), have all been held inadmissible.

The statements in question must also be objectively verifiable and subject to corroboration. *See Perry v. Bailey*, 12 Kan. 539, 545 (1874) ("If one [juror] affirms misconduct, the remaining eleven can

deny."). The California Evidence Code, for example, permits juror testimony about statements made during deliberations, but only with regard to statements that give rise to a presumption of misconduct just because they were uttered. *See* Cal. Evid. Code § 1150(a); *In re Stankewitz*, 40 Cal. 3d 391, 398 (1985). The California courts have rejected speculative claims or subjective impressions of prejudice. *In re Stankewitz*, 40 Cal. 3d at 398.

In many other jurisdictions that permit juror impeachment to address racial prejudice, courts have similarly declined to review statements of bias that do not relate to "specific readily identifiable facts or actions as opposed to evidence of subjective mental attitudes on the part of a juror." *Laguer*, 571 N.E.2d at 376; *see also United States v. Brassler*, 651 F.2d 600, 603 (CA8 1981); *People v. Holmes*, 372 N.E.2d 656, 659 (Ill. 1978). A constitutional exception to Rule 606(b) thus would only render testimony about racist statements admissible when that testimony can be proven or disproven. The objective verifiability of the evidence alleviates any concern with juror fraud or the possibility that a disgruntled juror could invent misconduct.

Furthermore, only overtly racist statements directed at the evidence—not stray remarks, insults exchanged between jurors, or even indications of general bigotry unrelated to the defendant—would render statements during deliberations admissible. *See Villar*, 586 F.3d at 87; *Shalhout*, 507 Fed. Appx. at 206-07 Despite the permissive approach to juror impeachment in the California rules, for example, courts there have held that the statements in question must constitute more than mere suggestions of racist thinking. *See People v. Steele*, 4 P.3d 225, 248 (Cal. 2002). Accordingly, courts have

rejected testimony concerning general references to racial stereotypes during deliberations, as well as alleged statements equally applicable to gang membership or racial status. *See People v. Ali*, 2013 WL 452901, at *19 (Cal. Ct. App. Feb. 7, 2013).

Nor would broader application of the constitutional exception significantly alter jurors' post-trial interactions with counsel and investigators. In states that recognize the exception, as in states that do not, juror contact rules and ethical canons already discourage parties from seeking juror statements after trial. The Colorado Code of Professional Conduct, for example, prohibits post-discharge communications with jurors that involve "misrepresentation, coercion, duress or harassment." Colo. R. Prof'l Conduct 3.5(c)(3). In many jurisdictions, jurors also receive instructions that they need not respond to any post-trial inquiries from counsel.

The present case arose because two jurors voluntarily reported their misgivings about the deliberations. A strict construction of Rule 606(b) is not necessary to protect jurors post-trial but will have the effect of frustrating jurors who seek to expose the possibility of a tainted verdict.

Moreover, permitting juror testimony on bias expressed during deliberations would not require any new procedural protocols. The screening mechanisms courts currently employ are the same as those used when allegations of external influences on jury deliberations arise pursuant to Rule 606(b)(2). Judges also screen claims that there is "good cause" to remove deliberating jurors under Rule 23(b). Fed. R. Crim. Pro. 23(b)(2)(B). *See, e.g.*, *United States v. Thomas*, 116 F.3d 606, 620 (CA2

1997). Granting review of evidence of racial or ethnic bias thus will not upset the existing balance between exposing juror misconduct and shoring up the finality and legitimacy of verdicts. As with allegations of racially-tainted remarks, claims of external influence are subject to corroboration and refutation. The only initial question is whether the information was received or the influence occurred. Impact on the verdict is a separate inquiry.

Faced, for example, with an allegation of bribery or receipt of extraneous information, a court first allows testimony to determine whether the act occurred. *See, e.g.*, *Haugh v. Jones & Laughlin Steel Corp.*, 949 F.2d 914, 917 (CA7 1991) (stating that the proper procedure is to establish "whether the communication was made and what it contained" "without asking the jurors anything further and emphatically without asking them what role the communication played in their thoughts or discussion"). The same basic objective analysis applies when allegations arise that jurors made racially prejudiced statements. Courts need only determine "whether the communication was made and what it contained." *Id.* They make no subjective inquiry into the impact of the communication on the deliberations.

Therefore, broader recognition of a constitutional exception would encompass only the objectively verifiable statements of a juror and would not require examination of the internal mental processes that Rule 606(b) was drafted to protect. *See* Fed. R. Evid. 606(b), Advisory Committee Note (the rule shields "mental operations and emotional reactions" during the jury's deliberative process); *see also Tobias v. Smith*, 468 F Supp. 1287, 1290 (W.D.N.Y. 1979) (allowing "objective evidence of

matters improperly introduced and considered by the jury in its verdict"). Courts need not analyze the jury's actual reasoning process or engage in an ex post assessment of whether the jury was affected by the racist assertions.

This is so in determining a remedy for the violation as well as its existence. The issue of remedy is not before the Court. Nor need the Court decide how lower courts should proceed to consider testimony about juror statements that reveal prejudice during deliberations. The only question presented is whether the evidence of bias lies behind the 606(b) shield. Indeed, the rule clearly states that it "does not purport to specify the substantive grounds for setting aside verdicts for irregularity." Fed. R. Evid. 606(b), Advisory Committee Note. Notably, however, none of the approaches that courts currently employ at the remedial stage would require evaluation of the jury's reasoning process during deliberations.

Under one approach, many lower courts have concluded that the Sixth Amendment right is violated "if even one member of the jury harbors racial prejudice." *United States v. Booker*, 480 F.2d 1310, 1311 (CA7 1973). According to this line of cases, proven racial bias on the part of a juror constitutes "a structural defect not subject to harmless error analysis." *State v. Phillips*, 927 A.2d 931, 934-36 (Conn. App. 2007); *see also State v. Santiago*, 715 A.2d 1, 20 (Conn. 1998) ("Allegations of racial bias on the part of a juror are fundamentally different from other types of juror misconduct because such conduct is, ipso facto, prejudicial."). That conclusion would be consistent with this Court's holding in *Gray* that jury impartiality is "so basic to a fair trial that [its]

infraction can never be treated as harmless error." 481 U.S. at 668 (quoting *Chapman v. California*, 386 U.S. 18, 23 (1967)).

In other jurisdictions, once the defendant establishes by a preponderance of the evidence that the jury was exposed to racially biased statements that may have infected the judicial process, the burden shifts to the state to show that there was no prejudice. Whether or not to grant a new trial turns on whether there is a "substantial probability that the alleged racial slur made a difference in the outcome." *Shillcutt*, 827 F.2d at 1159. Courts consider whether comments about the defendant's race or ethnicity would have "affected the verdict of a hypothetical average jury." *State v. Hidanovic*, 747 N.W.2d 463, 474 (N.D. 2008). A new trial only occurs where the "probable effect" of the racially charged comments was to taint the verdict. *See, e.g.*, *Villar*, 586 F.3d at 87 (district court determined on remand that the verdict was not tainted by the racially discriminatory statements and could stand).

This approach involves the same burden-shifting framework that operates when there are allegations of extraneous prejudicial information under Rule 606(b)(2). *See United States v. Williams-Davis*, 90 F.3d 490, 497 (CADC 1996) (questioning whether there is a reasonable possibility that the outside intrusion affected the verdict). Courts are already well-equipped to conduct the analysis, and it closely resembles the harmless-error review that occurs in a variety of contexts.

Courts confronting statements of racial bias may look, for example, to external indications like the jury's decision to acquit on some charges, *Shalhout*, 507 Fed. Appx. at 207, or overwhelming

evidence of guilt that reduces concern about racial bias infecting a verdict, *Fields v. Woodford*, 309 F.3d 1095, 1006-07 (CA9 2002). The admissibility inquiry turns only on the objective existence of the racial or ethnic prejudice and the nature and timing of the statements in question. But the remedial step can account for extrinsic indications of the impact on the verdict. Appellate courts also generally defer to a trial judge's factual determinations with regard to the impact that any racially or ethnically biased remarks about the defendant had on the deliberations. *State v. Levitt*, 176 A.2d 465, 468-69 (N.J. 1961).

In this case, the facts demonstrate both that an individual juror harbored substantial racial bias and applied that thinking to the determination of the defendant's guilt or innocence *and* that the bias was so frequently and clearly expressed that it tainted the deliberations as a whole. A juror's statements were "directly tied to the determination of the defendant's guilt." Pet. App. 26a (Marquez, J., dissenting). On more than one occasion during deliberations, a juror asserted that the defendant was guilty "because he's Mexican." Pet. App. 4a. The trial court in fact acknowledged that the juror testimony exposed prejudice in the deliberations, but then ruled that the bias could not support a new trial because of the no-impeachment rule. Tr. 3 (July 20, 2010).

In addition, petitioner's case was close and dependent on a problematic identification. It turned in important respects on the credibility of an alibi witness whose testimony the juror at the center of this appeal also discredited after (erroneously) labeling the alibi witness an "illegal." Pet. App. 4a-5a; Tr. 14 (Feb. 25, 2010). The jury then indicated

initial deadlock on all four charges and ultimately declined to convict on the most serious charge. The bias expressed here is thus severe, focused on the defendant's ethnicity, clearly connected with consideration of the facts of the case, and likely to have had an impact on deliberations.

In future cases in which a defendant proffers juror impeachment involving blatant expressions of racism as an argument in favor of guilt, every court should have access to the relevant testimony. There is no reason to think that jurors would forfeit meaningful protections as a result, or that courts would be incapable of screening for legitimate constitutional claims.

IV. THE POLICIES THAT RULE 606(b) SERVES ARE FURTHERED BY ALLOWING JUROR TESTIMONY IN CASES OF ALLEGED RACIAL OR ETHNIC BIAS.

Finally, there are expressive harms to applying the no-impeachment rule in cases in which the jurors, the court, the defendant, and potentially the public all know of overt discrimination for which there is no potential remedy. The Colorado Supreme Court's 4-3 decision in this case turned in large part on the policy implications of recognizing a constitutional exception to Rule 606(b). *See* Pet. App. 13a-15a. To be sure, the rule may give effect to concerns about intrusion into the jury room and public confidence in the finality of verdicts. But the scope of juror statements that would be considered under a narrow constitutional exception to 606(b) leaves the evidentiary exclusion largely intact. The category of potential juror testimony is sufficiently discrete that there is no danger of the exception swallowing the rule.

Furthermore, concern with "chilling" jury deliberations has no force when express racist speech is at issue. The jury necessarily enjoys some space for a "fruitful exchange of ideas and impressions," and jurors are "expected to bring commonly known facts and their experiences to bear in arriving at their verdict." *Shillcutt*, 827 F.2d at 1159. But there is nothing fruitful about racial animus. Racial and ethnic prejudice are "unrelated to any specific issue that a juror in a criminal case may legitimately be called upon to determine." *United States v. Henley*, 238 F.3d 1111, 1119-20 (CA9 2001).

Occasional consideration of juror statements under a constitutional exception would not inhibit juror exchanges. As it is, jurors neither expect nor enjoy complete privacy surrounding their deliberations. Rule 606(b) has always permitted non-juror testimony as well as the use of pre-verdict statements. The rule further allows post-verdict testimony about external influences even by jurors, and it does not address juror revelations outside of court. "Juror journalism" and public discussion about jury service is not uncommon in high profile cases. The Colorado court's construction of the rule thus permits wide reporting in the public domain of racially prejudiced statements by jurors while precluding any redress in court.

Perhaps the strongest arguments favoring strict interpretation of Rule 606(b) concern the validity of jury decision-making itself, but those also lack force when weighed against the harm of racial or ethnic bias. Because of the nature of the statements at issue, there are important institutional interests that counsel in favor of permitting inquiry into alleged statements of racial

or ethnic prejudice. That inquiry could support not only the accuracy of criminal verdicts and the unbiased administration of justice, but also the integrity and legitimacy of the jury system as a whole.

It is true that jury discussions might, upon close scrutiny, fall short of ideals about the deliberative process. Jury perfection remains an "untenable goal." *Benally*, 546 F.3d at 1240. Racial prejudice is among the most dangerous of the jury's imperfections, however, and when it reveals itself openly, confronting the available evidence will do more to preserve the institution of the jury than ignoring it.

A rigid interpretation of Rule 606(b) in the face of allegations of racial or ethnic bias affects not only the fundamental fairness of the trial but the appearance of fairness in the public eye. Indeed, the injury of racist fact-finding is not limited to the criminal defendant deprived of a fair trial. As this Court has recognized, prejudice causes injury "to the jury system, to the law as an institution, to the community at large, and to the democratic ideal reflected in the process of our courts." *Rose*, 443 U.S. at 556. *See also McCollum*, 505 U.S. at 49 ("One of the goals of our jury system is to impress upon the criminal defendant and the community as a whole that a verdict of conviction or acquittal is given in accordance with the law by persons who are fair."); *Batson*, 476 U.S. at 87 (stating that the "harm from discriminatory jury selection extends beyond that inflicted on the defendant and the excluded juror to touch the entire community" and "undermine public confidence in the fairness of our system of justice").

When a decision is based on bigotry, removing the deliberations from the court's purview damages rather than preserves the integrity of the jury. Both defendants and the public may become aware of racially biased statements by jurors through post-trial disclosures, and then look to the court to determine the constitutional significance of that bias.

If those "'smoking guns' are ignored, we have little hope of combating the more subtle forms of racial discrimination" in the criminal justice system. *Wilkerson v. Texas*, 493 U.S. 924, 928 (1989) (Marshall, J., dissenting). Considering testimony about openly expressed animus cannot "keep improper bias from being a silent factor with a particular juror." *Powell v. Allstate Ins. Co.*, 652 So.2d 354, 357 (Fla. 1995). It can, however, allow courts to address cases in which a juror clearly demonstrates prejudice against a defendant or that bias is "expressed so as to overtly influence others." *Id.* at 358.

This Court has stated that the jury system might not survive "efforts to perfect it." *Tanner*, 483 U.S. at 120. But neither can it survive efforts to protect it that shield explicit racial prejudice from review.

CONCLUSION

For the foregoing reasons, the decision of the Colorado Supreme Court should be reversed.

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Supreme Court of the United States

MIGUEL ANGEL PEÑA RODRIGUEZ,

Petitioner,

v.

STATE OF COLORADO,

Respondent.

On Writ Of Certiorari To The Colorado Supreme Court

BRIEF OF AMICUS CURIAE THE UNITED MEXICAN STATES IN SUPPORT OF PETITIONER

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Death Penalty Information Center, National Statistics on the Death Penalty and Race, http://www.deathpenaltyinfo.org/race-death-row-inmates-executed-1976#inmaterace 9

John J. Donohue III, *An Empirical Evaluation of the Connecticut Death Penalty System Since 1973: Are There Unlawful Racial, Gender, and Geographic Disparities?*, 11 J. EMPIRICAL LEGAL STUD. 673 (2014) 8

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INTEREST OF AMICUS CURIAE[1]

Petitioner, Miguel Angel Peña Rodriguez, is a Mexican national. The United Mexican States ("Mexico") has a vital stake in ensuring that its nationals abroad are afforded all of the rights to which they are entitled under international and domestic law. Mexico's obligation necessarily includes protecting the right of its nationals within the United States to trial by a truly impartial jury – one that does not discriminate on the basis of ethnicity or national origin. Mexico respectfully presents this brief in an effort to broaden the Court's perspective, by addressing the potential implications of its decision in this case for the more than 33 million Hispanics of Mexican origin residing in the United States, 11 million of whom are Mexican-born.[2]

SUMMARY OF THE ARGUMENT

Hispanics and Mexican nationals have long been the victims of discriminatory treatment in the U.S. criminal justice system. Along with this Court's precedents, international law prohibits discriminatory

[1] No person or entity other than the Government of Mexico made a monetary contribution to the preparation or submission of this brief. Petitioner and Respondent have consented to the filing of this amicus brief.

[2] ANA GONZALEZ-BARRERA & MARK HUGO LOPEZ, PEW RESEARCH CTR., A DEMOGRAPHIC PORTRAIT OF MEXICAN-ORIGIN HISPANICS IN THE UNITED STATES (2013), *available at* http://www.pewhispanic.org/2013/05/01/a-demographic-portrait-of-mexican-origin-hispanics-in-the-united-states/ (last visited June 20, 2016).

treatment in the courts on the basis of race or nationality and requires courts to provide an effective judicial remedy for any violation of this requirement.

For over a century, this Court has recognized the need to protect Hispanics and Mexicans from discrimination in the courts, and has forbidden discriminatory treatment in jury selection and in the State's presentation of its case. Consistent with this long-standing recognition, this Court must require lower courts to consider evidence of overt racial bias during jury deliberations in the rare cases where it arises. Such a requirement protects the constitutional and international law rights of all defendants, including foreign nationals, and prevents convictions and even executions tainted by known racial or ethnic bias.

Although jurors may be biased against defendants in myriad ways, courts have long been tasked with recognizing the uniquely dangerous presence of racial or nationality-based bias, even when they are accompanied by other forms of animus. Mexico urges this Court to reverse the decision below and to reject a rule that privileges mere policies and prudential concerns over the Constitution's sacred guarantee of a truly impartial jury.

ARGUMENT

I. This Case Must Be Viewed in the Context of a History of Discrimination Against Mexicans and Other Hispanics in the Criminal Justice System.

This Court has long acknowledged that "[t]hroughout our history differences in race and color have defined easily identifiable groups which have at times required the aid of the courts in securing equal treatment under the laws,"[3] and has "continued to acknowledge the necessity of using strong remedial and preventive measures to respond to the widespread and persisting deprivation of constitutional rights resulting from this country's history of racial discrimination."[4] This history includes discrimination against Mexicans, specifically in the administration of criminal justice; more than 50 years ago this Court recognized that Mexican Americans faced systematic exclusion from jury service in Texas.[5]

Despite this early judicial recognition, the lynchings and mob violence commonly known to have targeted African Americans in the 19th and 20th centuries were also directed at Mexicans, and this fact is not nearly as widely known. Leading historians on the subject have explained, "[f]rom the California Gold Rush to the last

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[3] *See Hernandez v. Texas*, 347 U.S. 475, 478 (1954); *see also Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 421 (1978) (opinion of Marshall, J.) (recognizing the "sorry history of discrimination and its devastating impact on the lives of Negroes").

[4] *City of Boerne v. Flores*, 521 U.S. 507, 526 (1997).

[5] *See Hernandez*, 347 U.S. 475.

recorded instance of a Mexican lynched in public in 1928, vigilantes hanged, burned, and shot thousands of persons of Mexican descent in the United States. The scale of mob violence against Mexicans is staggering, far exceeding the violence exacted on any other immigrant group and comparable, at least on a per capita basis, to the mob violence suffered by African Americans."[6] Nor is this history of discrimination in the criminal justice arena limited to mob violence; in the late 19th and early 20th centuries, "[t]he sentencing policy of the [New Mexico] court appears to have been in part determined by the ethnic identity of the convicted felon, evidenced by the fact that they imposed particularly harsh prison terms on Nuevomexicanos [Mexicans living in New Mexico]. The disproportionate number of Nuevomexicanos executed during these years demonstrates that state authorities had to a certain extent supplanted the role of the lynch mob."[7]

Although the mob violence has abated, discrimination persists. More than 60 percent of Latinos surveyed by the Pew Research Center in 2010 agreed that discrimination against Hispanics was a "major problem" – a number that had risen significantly since a survey three years earlier.[8] And studies have reported

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[6] WILLIAM D. CARRIGAN & CLIVE WEBB, FORGOTTEN DEAD 1 (2013).

[7] *Id.* at 162.

[8] MARK HUGO LOPEZ ET AL., PEW RESEARCH CTR. HISPANIC TRENDS, ILLEGAL IMMIGRATION BACKLASH WORRIES, DIVIDES LATINOS (2010), *available at* http://www.pewhispanic.org/2010/10/28/illegal-immigration-backlash-worries-divides-latinos/ (last visited June 20, 2016).

differential treatment of Latinos in the criminal justice system.[9]

Public attitudes toward immigration issues tend to reinforce negative stereotypes of Latin Americans. A 2015 opinion poll found "Americans are more likely to say the impact of Latin American immigrants on U.S. society is mostly negative (37%) than to say it is mostly positive (26%)."[10] In addition, "fully half of U.S. adults say that immigrants make American society worse when it comes to crime" and "only 8% say immigrants lessen the crime problem in their communities. . . ."[11]

Attempts by state legislators to criminalize undocumented migrants also exacerbate latent discrimination against Mexicans and other Hispanic immigrants within the criminal justice system. Several U.S. states have passed anti-immigration laws effectively singling out Mexican nationals and other Hispanics, authorizing police to stop and check the residency status of people based on little more than their appearance. As

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[9] NANCY E. WALKER ET AL., NAT'L COUNCIL OF LA RAZA, LOST OPPORTUNITIES: THE REALITY OF LATINOS IN THE U.S. CRIMINAL JUSTICE SYSTEM (2004) at 1 ("[R]esearch and information to date show that, along with other persons of color, Latinos receive more severe treatment at all stages of the criminal justice system, beginning with police stops and ending with longer periods of incarceration, than similarly-situated White Americans.").

[10] PEW RESEARCH CTR., MODERN IMMIGRATION WAVE BRINGS 59 MILLION TO U.S., DRIVING POPULATION GROWTH AND CHANGE THROUGH 2065 (2015) at 51-54, *available at* http://www.pewhispanic.org/2015/09/28/chapter-4-u-s-public-has-mixed-views-of-immigrants-and-immigration/ (last visited June 20, 2016).

[11] *Id.*

Mexico stated in a brief challenging one such state law, this approach "creates an imminent threat of state-sanctioned bias or discrimination, resulting not only in individual injury, but also in broader social and economic harms to Mexico's citizens; thereby undermining U.S.-Mexico relations."[12]

Taken together, these attitudinal and political trends demonstrate that a significant portion of the population shares, or is now coming to share, a viewpoint linking Mexicans living and working in the United States with criminality. Some people holding these negative perceptions have undoubtedly served, and will continue to serve, on juries. The frequency of toxic attitudes toward Mexicans and other Hispanics being expressed in public discourse may well embolden some individuals to express their xenophobic and racist beliefs to their fellow jurors. If the Respondent's position were to become the legal standard, courts would be powerless to address compelling allegations of actual bias that poisoned jury deliberations, and convictions known to be tainted by impermissible animus would stand.

The very cases populating the split that this Court has now undertaken to resolve illustrate with uncomfortable starkness the prejudicial attitudes specifically against Mexicans and other Hispanics that have infected jury deliberations. The appalling facts of some of

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[12] Brief of the United Mexican States as Amicus Curiae in Support of Plaintiffs' Complaint for Declaratory and Injunctive Relief at 1, Hispanic Interest Coalition v. Governor of Ala., No. 5:11-cv-02484-SLB (N.D. Ala. Aug. 3, 2011).

these cases bear repeating. For example, the Massachusetts case *Commonwealth v. Laguer* is cited in the briefing for its legal ruling – that the Sixth Amendment requires consideration of juror testimony – but this Court should not lose sight of what the juror affidavit submitted in that case actually said:

> "One juror, [juror X], remarked about the defendant, 'the goddamned spic is guilty just sitting there; look at him. Why bother having the trial.' Moreover, during the jury deliberations, there was much unsubstantiated speculation about how anyone could have raped someone all night. This time [juror X] stated that 'spics screw all day and night,' and again alluded to the defendant's guilt."[13]

This startling affidavit reveals that a juror not only harbored racial animus against Hispanics, but explicitly tied his belief in the defendant's guilt to his Hispanic ethnicity, just as the juror did in Petitioner's trial.

Nor was the racist conduct in *Laguer* limited to individual jurors' expression of the reason for their votes. The affidavit continued, explaining that "[Juror X] not only made specific comments, but during deliberations as well as outside deliberations (for example, at lunch) he would go from one juror to another invoking racist overtones while discussing the defendant's guilt"; the juror who submitted the affidavit felt "constantly bombarded with racist attacks on the defendant uttered by

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[13] 410 Mass. 89, 94 (1991).

other jury members."[14] This extreme example starkly illustrates an additional problem with failing to address jury room bias: one biased juror can infect others, spreading his discriminatory and unconstitutional reasoning to jurors who would otherwise have been impartial.

In another case, a juror emailed defense counsel and reported that a fellow juror had said, "I guess we're profiling but they cause all the trouble," which the First Circuit recognized as referring to the defendant's Hispanic ethnicity.[15] This juror apparently realized his actions were improper, but injected these unconstitutional considerations into the deliberations anyway. Importantly, these are not subtle jabs or indiscretions of terminology; instead, the jurors forthrightly connected the defendants' Hispanic race with guilt, in direct contradiction to the right to a fair trial before an impartial jury.

Although the Petitioner in the instant case was not facing capital charges, the Court's decision clearly will impact death penalty cases, where racial discrimination is most alarming.[16] Even if racial bias only impacts a small number of prosecutions, the problem

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[14] *Id.*

[15] *United States v. Villar*, 586 F.3d 76, 76 (1st Cir. 2009).

[16] *See, e.g.*, Justin D. Levinson et al., *Devaluing Death: An Empirical Study of Implicit Racial Bias on Jury-Eligible Citizens in Six Death Penalty States*, 89 N.Y.U.L. REV. 513, 558 (2014) (finding that death-qualified jurors held both greater implicit and greater explicit racial bias than non-death-qualified jurors); John J. Donohue III, *An Empirical Evaluation of the Connecticut Death*

remains significant for the Mexican and Mexican American communities. Today approximately 383 Hispanics reside on death row in the United States,[17] including 59 Mexican nationals,[18] as a result of a system that this Court has acknowledged involves racial disparities.[19]

While systemic and cultural racism are not squarely at issue in this case, this long and continuing history must inform the Court's response to known, overt, and explicit bias. This country's, and this Court's, long struggle against racism in the criminal justice system demonstrates that racial bias is a largely intractable problem.[20] It is virtually impossible to prove systemic discrimination in particular cases,

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Penalty System Since 1973: Are There Unlawful Racial, Gender, and Geographic Disparities?, 11 J. EMPIRICAL LEGAL STUD. 673 (2014) (presenting sophisticated statistical evidence that minority defendants who kill white victims are far more likely to be sentenced to death); Mona Lynch & Craig Haney, *Discrimination and Instructional Comprehension: Guided Discretion, Racial Bias, and the Death Penalty*, 24 LAW & HUM. BEHAV. 337, 349 (2000) (mock juror study found that white jurors were more likely to impose the death penalty on a black defendant than on a white defendant).

[17] Death Penalty Information Center, National Statistics on the Death Penalty and Race, http://www.deathpenaltyinfo.org/race-death-row-inmates-executed-1976#inmaterace (last visited June 20, 2016).

[18] Death Penalty Information Center, Foreign Nationals and the Death Penalty in the U.S., http://www.deathpenaltyinfo.org/foreign-nationals-and-death-penalty-us#Nationality (last visited June 20, 2016).

[19] *McCleskey v. Kemp*, 481 U.S. 279, 313 (1987).

[20] *Id.*

although this Court requires such proof for relief.[21] Similarly, the difficulty of ferreting out and interrupting *implicit* biases makes it essential that, in those rare cases where jurors *do* overtly express their biases, courts not turn a blind eye. Refusing to allow juror testimony about racial bias during deliberations in the rare cases where racial bias explicitly surfaces would perpetuate a rule tolerating not simply the conviction, but in some cases the execution of defendants sentenced by demonstrably racially biased jurors.

II. International Law Prohibits Discriminatory Treatment Before the Courts and Mandates an Effective Judicial Remedy for Any Violation of This Binding Norm.

This Court has at times recognized the valuable guidance that international human rights law provides in resolving difficult questions. In particular, in its constitutional analyses of equal protection cases, this Court has recognized international law reflects the "values that we share with a wider civilization."[22] These principles are especially appropriate in this case, where race and national origin discrimination infected the U.S. trial of a foreign national, thus

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[21] *Id.*

[22] *Lawrence v. Texas*, 539 U.S. 558, 573 (2003); *see also Grutter v. Bollinger*, 539 U.S. 306, 344 (2003) (Ginsburg, J., concurring) (citing the Convention on the Elimination of All Forms of Racial Discrimination as instructive in determining merits of a discrimination claim).

implicating not only the U.S. Constitution, but the relationship between two countries.

The International Covenant on Civil and Political Rights ("ICCPR") and the International Convention on the Elimination of All Forms of Racial Discrimination ("CERD") are especially informative on the issues in this case. Both instruments expressly prohibit any form of discrimination within the criminal justice system and both mandate effective remedies for any violation of equal treatment before the courts.

One hundred and sixty-eight countries have adopted the ICCPR, including the United States and Mexico. Upon its ratification in 1992, "the treaty became, coexistent with the United States Constitution and federal statutes, the supreme law of the land."[23] Article 14 of the ICCPR declares that all persons "shall be equal before the courts" and that everyone facing charges "shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law." These rights apply "without distinction of any kind," such as race, national origin, birth or other status.[24]

Similarly, the provisions of the CERD bind the United States, Mexico and 175 other countries. Article

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[23] *United States v. Duarte-Acero*, 208 F.3d 1282, 1284 (11th Cir. 2000); *accord State v. Carpenter*, 69 S.W.3d 568, 578 (Tenn. 2001).

[24] International Covenant on Civil and Political Rights, art. 2(1), Dec. 16, 1966, 999 U.N.T.S. 171 (entered into force for the United States Sept. 8, 1992).

5 of the CERD guarantees "the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law," including the right to "equal treatment before the tribunals and all other organs administering justice."[25]

Even a single juror judging a defendant on the basis of race or nationality violates these guarantees. If and when such inequality becomes known to the Court, the Court must respond to the violation.

Both the ICCPR and CERD require effective remedies for breaches of their non-discrimination provisions. Under CERD Article 6, the United States must provide "effective protection and remedies, through the competent national tribunals" for any discriminatory acts contrary to the Convention. For its part, ICCPR Article 2(3) requires that any such breach "shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity," and that each State Party shall "develop the possibilities of judicial remedy." This case presents the perfect opportunity to develop exactly such a remedy.

Allowing the decision below to stand would allow courts to acknowledge that the jury determination was biased, in violation of these treaties, but fail to provide the required remedy. Failure to rectify the manifestly biased jury deliberations in this case would thus run afoul of binding international norms. At a minimum,

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[25] International Convention on the Elimination of All Forms of Racial Discrimination, Mar. 7, 1966, arts. 5, 5(a), 660 U.N.T.S. 195 (entered into force for the United States Nov. 20, 1994).

these "express affirmation[s] of certain fundamental rights by other nations and peoples" should serve to "underscore[] the centrality of those same rights within our own heritage of freedom."[26]

III. The Federal Courts Have Long Recognized the Need for Safeguards to Prevent Discrimination, Specifically Against Hispanics, in Jury Selection and Jury Deliberations.

For more than half a century, this Court has acted systematically to insulate each stage in the jury process from discrimination against Mexican-Americans and other Hispanics. For example, the wholesale exclusion of persons of Mexican descent from grand jury service is unconstitutional,[27] and the grand jury selection process may not discriminate against Mexican-Americans through substantial underrepresentation.[28] Likewise, prosecutors may not use peremptory challenges to exclude Latinos from jury service based on their ethnicity.[29]

Courts have also forbidden prosecutors from making race- and nationality-based appeals to juries. Following this Court's dictates, other Article III courts have explained that the Constitution "prohibits a prosecutor from making race-conscious arguments since it draws the jury's attention to a characteristic that the

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[26] *Roper v. Simmons*, 543 U.S. 551, 578 (2005).

[27] *Hernandez*, 347 U.S. 475.

[28] *Castañeda v. Partida*, 430 U.S. 482 (1977).

[29] *Hernandez v. New York*, 500 U.S. 352, 355 (1991).

Constitution generally demands that the jury ignore."[30] In *United States v. Cabrera*, the Court reversed the convictions of two defendants from Cuba because "the lead detective injected extraneous, prejudicial material, including impermissible references to [the defendants'] national origin."[31] The First Circuit did the same with a defendant from Colombia when an otherwise irrelevant identification card identifying him as being Colombian was admitted into evidence: "A card identifying the defendant as a native Colombian could have been and was, in fact, used as the basis for making generalizations about all Colombians. The admission of the card as an exhibit made it more likely that whatever preconceived notions the jury might have had about Colombians and drug trafficking would infect the deliberative process."[32] And this Court has condemned Texas's practice of presenting testimony in capital cases that links a defendant's ethnicity to his future propensity for violence.[33]

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[30] *United States v. Hernandez*, 865 F.2d 925, 928 (7th Cir. 1989).

[31] *United States v. Cabrera*, 222 F.3d 590, 591 (9th Cir. 2000).

[32] *United States v. Rodriguez Cortes*, 949 F.2d 532, 542 (1st Cir. 1991).

[33] *Saldano v. Texas*, 530 U.S. 1212 (2000). The *Saldano* Court vacated the judgment against a death-sentenced Argentine national and remanded for a new sentencing hearing after the State confessed error: the psychologist who testified for the State at trial opined that the defendant's Hispanic ethnicity was a factor weighing in favor of a future dangerousness finding. *See also Buck v. Stephens*, 623 F. App'x 668, 670 (5th Cir. 2015), *cert. granted*, 2016 U.S. LEXIS 3625 (June 6, 2016) (noting that after *Saldano*,

This Court has written that providing an accused with the right to be tried by an impartial jury of his peers "gave him an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge."[34] While that is undoubtedly true, the damage to fairness is just as great – indeed, it could be much greater – from a bigoted juror who eludes detection at voir dire and who sows his prejudices in the jury room with the authority of an officer of the law. While prosecutors and judges *influence* the outcome, jurors *determine* the outcome. The remedy that the Petitioner seeks in this case is simply the culmination of a decades-long process by which this Court has given full effect to the Sixth Amendment promise of trial by a genuinely impartial jury. It would be counterproductive to close every other portal in pursuit of jury impartiality while leaving one gate standing wide, through which insidious racist beliefs openly enter.

IV. Preventing Impermissible Discrimination During Jury Deliberations Requires Additional Safeguards.

The court below and the State make much of the fact that jurors are only seated after the court and the lawyers have the opportunity to conduct voir dire. The briefing identifies several reasons why voir dire

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"the AG publicly identified eight other cases involving racial testimony by [the same psychologist], six of which the AG said were similar to Saldano's case").

[34] *Duncan v. Louisiana*, 391 U.S. 145, 156 (1968).

insufficiently identifies racially biased jurors (as opposed to other types of juror issues discussed in *Tanner v. United States*[35]), including sound strategy often dictating avoiding overt questions about racial bias, and few potential jurors being willing to admit to holding racist views in a formal courtroom in front of a judge. Even if voir dire could sufficiently identify racial bias, trial judges have broad discretion to control voir dire, and are not required to permit defense counsel to ask the necessary questions in every case. This Court's decisions have not required specific questioning about racial bias in cases where race is not a central factor.[36] Thus, even assuming voir dire on racial bias could be efficacious, defendants cannot rely on it to protect their right to an impartial jury. The mere *possibility* of such an avenue in some cases is not sufficient to effectuate a constitutional guarantee.

Moreover, the additional *Tanner* safeguard of jurors being able to come forward with their concerns before a verdict is rendered is hampered by the exclusion of noncitizens from juries, especially where the bias concerns nationality. While of course any juror could raise the issue of bias based on nationality with the judge or counsel, those most likely to do so – those who

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[35] 482 U.S. 107 (1987).

[36] *See Ristaino v. Ross*, 424 U.S. 589, 598 (1976) (holding that where the racial angle in a case was "[t]he mere fact that the victim of the crimes alleged was a white man and the defendants were Negroes," "the demands of due process could be satisfied by [] more generalized but thorough inquiry into the impartiality of the veniremen").

share the pertinent characteristic – are not on the jury to begin with.

Experience confirms that voir dire cannot be relied upon to prevent racial bias in the jury room. The Government of Mexico funds a program, the Mexican Capital Legal Assistance Program (MCLAP), supervised through the Mexican Foreign Office in Mexico City. With a staff of highly experienced capital defense counsel around the United States, MCLAP monitors and offers assistance in every capital case in the United States with a Mexican national defendant.[37] This program gives the Government of Mexico a unique perspective, as it is able to identify trends and issues that recur in case after case. Time and again, MCLAP attorneys have seen trial judges place significant limits on both the time and the type of questions permitted in capital voir dire.[38] Some trial courts literally allow just five minutes of questioning per juror, even in capital cases[39] – and in a capital case, defense counsel must

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[37] Several courts have remarked on the assistance provided by MCLAP. *See, e.g.*, *Marquez-Burrola v. State*, 157 P.3d 749, ¶ 48 (Okla. Crim. App. 2007); *United States v. Cisneros*, 397 F. Supp. 2d 726, 728-29 (E.D. Va. 2005); *Moreno v. State*, 2010 Tenn. Crim. App. LEXIS 514 *15 (2010); *Hernandez-Alberto v. State*, 126 So. 3d 193, 202 (Fla. 2013).

[38] *Cf.* Ann M. Roan, *Cover Story: Reclaiming Voir Dire*, 37 CHAMPION 22, 23 (2013).

[39] *See, e.g.*, *Dunlap v. State*, 360 P.3d 289, 300 (Idaho 2015) ("Individual voir dire was limited by the district court to five minutes per side for each juror."); *Parker v. State*, 216 P.3d 841 (Okla. Crim. App. 2009) ("The five-minute time limit that the trial court imposed on the parties, starting on the second day of voir dire, was repeatedly challenged by defense counsel.").

additionally uncover jurors' attitudes about the death penalty and receptiveness to mitigation. In such cases, even if a trial court were to permit questioning about attitudes regarding race, counsel primarily concerned with preventing a death sentence could often not afford to spend their limited time attempting to get an enlightening answer on this topic.

In addition to observing difficulties with voir dire, Mexico has documented numerous cases in which Mexican nationals have been subjected to discriminatory treatment. As Mexico observed in its Memorial to the International Court of Justice in the *Avena* case:[40] "At times, authorities are overtly hostile to Mexican nationals, and in a high percentage of cases, the media emphasize the defendants' nationality in reporting on the allegations against him."[41]

At the same time, allegations of overtly racist statements made by jurors during deliberations are extremely rare. Indeed, since its founding in 2000, MCLAP has not yet seen a capital case with a Mexican national defendant in which allegations of a juror's explicit expression of racial bias during deliberations arose and were brought to the court's attention. While racial bias arises frequently, the particular evidence of the problem that arose in Petitioner's case is rare.

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[40] *Avena and Other Mexican Nationals (Mexico v. United States)*, 2004 I.C.J. 12 (Mar. 31, 2004).

[41] Memorial of Mexico (Mex. v. U.S.), 2003 I.C.J. Pleadings (Avena and Other Mexican Nationals) (June 20, 2003), ¶ 40; *see also id.* ¶¶ 43-48 (describing specific cases).

Because racial and ethnic discrimination, in general and specifically against Mexicans, is so widespread a problem, enduring for centuries and proving itself intractable, and because the existing safeguards to prevent bias from influencing criminal proceedings cannot guarantee an impartial jury, this Court must allow the additional safeguard of receiving available evidence of overt racial bias during deliberations.

Indeed, this Court has long held that jurors may testify in post-conviction hearings where juror impartiality is at issue.[42] Determining the impact upon the juror obviously contemplates testimony by that juror, and to "hold otherwise would be to exalt artifice above reality."[43] The State has not even tried to explain why the practice of taking post-conviction juror testimony is uniquely inapplicable here, where this Court's protections should be at their height.

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[42] *Smith v. Phillips*, 455 U.S. 209 (1982); *Remmer v. United States*, 347 U.S. 227, 230 (1954) (trial court "should determine the circumstances, the impact thereof upon the juror, and whether or not it was prejudicial, in a hearing with all interested parties permitted to participate").

[43] *Gregory v. Helvering*, 293 U.S. 465, 470 (1935); *see also Interspiro USA, Inc. v. Figgie Int'l, Inc.*, 18 F.3d 927, 932 (Fed. Cir. 1994) (rejecting an argument that "impermissibly elevates form over substance").

V. Courts Should Be Required to Consider Evidence of Juror Bias Reasonably Tied to Race and Nationality.

The clear standards articulated by Retired Judges[44] provide a fair and practical procedure for enacting this protection. Courts can "determine the precise content and context of the statement to determine whether it reflects the juror's actual racial or ethnic bias," which, if established, requires a new trial, and even in the absence of true bias, the court can determine "whether the juror's statements so infected the deliberative process as to compromise the defendant's right to a fair trial."[45]

In announcing a rule in this case, this Court must clearly articulate its boundaries. As an initial matter, it is impossible to separate a claim about race from a claim about nationality; in many contexts, the two are used interchangeably. In this case, the opinion below referred to "affidavits suggesting that one of the jurors exhibited racial bias against the defendant," when the affidavits in question used the term "Mexican."[46] Courts, including this Court, routinely couple the two terms when discussing discrimination, and have done so for more than a century.[47]

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[44] *See* Cert. Amicus Br. of Retired Judges at 6-7.

[45] *Id.* at 6.

[46] Pet. for Cert. at 2A.

[47] *See, e.g., Jean v. Nelson*, 472 U.S. 846, 856 (1985); *Grutter*, 539 U.S. 306; *Hernandez*, 347 U.S. 475; *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886) (equal protection clause applies "to all persons

Bias and discrimination come in many forms. Indeed, in this very case the jurors' allegations at times conflated multiple attributes, referring sometimes specifically to Mexican nationality and other times to a witness's (wrongly) presumed immigration status – itself a race-based attitude, as the juror apparently operated on the racial stereotype that all people of Hispanic appearance were undocumented Mexican immigrants. In truth many are U.S. citizens or authorized to be in the U.S.; many are not Mexican at all, but come from other countries in Latin America. Thus, race, nationality, and immigration status are often grouped together in a single set of stereotypes. Similarly, race and religion are increasingly interrelated as, for instance, public views of people of Middle Eastern descent have shifted increasingly toward assuming they are Muslim, but this does not render stereotypes about these individuals non-racial. Biased attitudes are not always neatly contained to a single axis.

Whether other concerns, including immigration status and religion, factored into the biased statements and attitudes or not, the question for the Court must simply be whether the juror's statements reflect the *existence* of bias *based on race or nationality*. If a juror articulated such a bias during deliberations, no matter what other statements he made, courts must be free to accept that evidence and grant a new trial. Trial courts, faced with the actual facts of what is said and

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within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality; and the equal protection of the laws is a pledge of the protection of equal laws").

in what context, are well equipped to determine if a statement truly reflects bias based on race or nationality. They can do this regardless of whether the content of the remarks extends to other forms of bias.

CONCLUSION

For the foregoing reasons, the Court should reverse the opinion of the Colorado Supreme Court and hold that courts must consider evidence of racial or nationality bias expressed during jury deliberations, rules of evidence to the contrary notwithstanding.

Respectfully submitted,

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